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REPORTS OF CASES

DETERMINED IN THE

APPELLATE COURTS

OF ILLINOIS

WITH A DIRECTORY OF THE JUDICIARY DEPARTMENT OF
THE STATE, CORRECTED TO THE SECOND OF JANU-
ARY, 1903, AND A TABLE OF CASES REVIEWED
BY THE SUPREME COURT TO THE
DATE OF THE PUBLICATION
OF THIS VOLUME.

VOL. CIII.

A. D. 1903

EDITED BY

MARTIN L. NEWELL

AUTHOR OF "THE LAW OF LIBEL AND SLANDER," "A TREATISE UPON
THE LAW OF EJECTMENT," ETC.

CHICAGO

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DIRECTORY OF THE JUDICIARY DEPARTMENT OF THE STATE OF ILLINOIS.

CORRECTED TO JANUARY 2, 1903.

The judiciary department of the State of Illinois is composed of (1) the Supreme Court; (2) the Appellate Courts; (3) Circuit Courts; (4) Courts of Cook County; (5) City Courts; (6) County and Probate Courts.

(1) THE SUPREME COURT.

The Supreme Court consists of seven justices, elected for a term of nine years, one from each of the seven districts into which the State is divided.

Formerly the State was divided into three grand divisions, Southern, Central and Northern, in which the terms were held, with one clerk for each of the three grand divisions elected for a term of six years, the court sitting at Mt. Vernon, Springfield and Ottawa.

In 1897 these divisions were consolidated into one comprising the entire State, and provision made that all terms of the court be held in the city of Springfield, on the first Tuesday in October, December, February, April and June of each year.

REPORTER.

ISAAC N. PHILLIPS.....Bloomington.

JUSTICES.

First District—CARROLL C. BOGGS.....Fairfield.
Second District—JAMES B. RICKS.....Taylorville.
Third District—JACOB W. WILKIN.....Danville.
Fourth District—JOSEPH N. CARTER.....Quincy.
Fifth District—JOHN P. HAND.....Cambridge.
Sixth District—JAMES H. CARTWRIGHT.....Oregon.
Seventh District—BENJAMIN D. MAGRUDER.....Chicago.

The Chief Justice is chosen by the court, annually, at the June term. The rule of the court is to select as successor to the presiding justice the justice next in order of seniority who has not served as Chief Justice within six years last past. Mr. Justice Magruder is the present Chief Justice.

CLERK.

CHRISTOPHER MAMER, 158 Throop St., Chicago.

LIBRARIAN.

RALPH H. WILKIN, Robinson.

(2) APPELLATE COURTS.

These Courts are held by Judges of the Circuit Courts assigned by the Supreme Court for a term of three years. One Clerk is elected in each district.

REPORTER.

MARTIN L. NEWELL.....Springfield.

FIRST DISTRICT.

Composed of the county of Cook.

Court sits at Chicago on the first Tuesdays of March and October.

CLERK—Alfred R. Porter, Ashland Block, Chicago.

FARLIN Q. BALL, Presiding Justice, Ashland Block, Chicago.

FRANCIS ADAMS, Justice, Ashland Block, Chicago.

THOMAS G. WINDES, Justice, Ashland Block, Chicago.

BRANCH APPELLATE COURT.*

FIRST DISTRICT.

ARBA N. WATERMAN, Presiding Justice, Ashland Block, Chicago.

HENRY M. SHEPARD, Justice, Ashland Block, Chicago.

EDMUND W. BURKE, Justice, Ashland Block, Chicago †

HENRY V. FREEMAN, Justice, Ashland Block, Chicago.

APPELLATE COURTS—(CONTINUED.)

SECOND DISTRICT.

Composed of the Northern Grand Division of the Supreme Court, except Cook county.

Court sits at Ottawa, La Salle county, on the first Tuesdays in April and October.

CLERK—Christopher C. Duffy, Ottawa.

GEORGE W. BROWN, Presiding Justice, Wheaton.

HARRY HIGBEE, Justice, Pittsfield.

DORRANCE DIBELL, Justice, Joliet.

THIRD DISTRICT.

Composed of the Central Grand Division of the Supreme Court.

Court sits at Springfield, Sangamon county, on the third Tuesdays in May and November.

CLERK—W. C. Hippard, Springfield.

FRANCIS M. WRIGHT, Presiding Justice, Urbana.

OLIVER A. HARKER, Justice, Carbondale.

BENJAMIN R. BURROUGHS, Justice, Edwardsville.

* This court is a branch of the Appellate Court of the first district, and is held by three judges of the Circuit Court, designated and assigned by the Supreme Court under the provisions of the act of the General Assembly, approved June 2, 1897. Hurd's Statute, 1897, 503, Laws of 1897, 135.

† Assigned to fill vacancy caused by the temporary resignation of Henry M. Shepard.

FOURTH DISTRICT.

Composed of the Southern Grand Division of the Supreme Court. Court sits at Mount Vernon, Jefferson county, on the fourth Tuesdays in February and August.

CLERK—Albert C. Millspaugh, Mount Vernon.

HIRAM BIGELOW, Presiding Justice, Galva.

JAMES A. CREIGHTON, Justice, Springfield.

NICHOLAS E. WORTHINGTON, Justice, Peoria.

(3) CIRCUIT COURTS.

Exclusive of Cook county, the State of Illinois is divided into Seventeen Judicial Circuits, as follows : *

First Circuit.—The counties of Alexander, Pulaski, Massac, Pope, Johnson, Union, Jackson, Williamson and Saline.

JUDGES.

JOSEPH P. ROBERTS, Cairo.

OLIVER A. HARKER, Carbondale.

ALONZO K. VICKERS, Vienna.

Second Circuit.—The counties of Hardin, Gallatin, White, Hamilton, Franklin, Wabash, Edwards, Wayne, Jefferson, Richland, Lawrence and Crawford.

JUDGES.

EDMUND D. YOUNGBLOOD, Mount Vernon.

PRINCE A. PEARCE, Carmi.

ENOCH E. NEWLIN, Robinson.

Third Circuit.—The counties of Randolph, Monroe, St. Clair, Madison, Bond, Washington and Perry.

JUDGES.

BENJAMIN R. BURROUGHS, Edwardsville.

MARTIN W. SCHAEFER, Belleville.

WILLIAM HARTZELL, Chester.

Fourth Circuit.—The counties of Clinton, Marion, Clay, Fayette, Effingham, Jasper, Montgomery, Shelby and Christian.

JUDGES.

WILLIAM M. FARMER, Vandalia.

TRUMAN E. AMES, Shelbyville.

SAMUEL L. DWIGHT, Centralia.

Fifth Circuit.—The counties of Vermilion, Edgar, Clark, Cumberland and Coles.

JUDGES.

HENRY VAN SELLAR, Paris.

M. W. THOMPSON, Danville.

FRANK K. DUNN, Charleston.

Sixth Circuit.—The counties of Champaign, Douglas, Moultrie, Macon, DeWitt and Piatt.

JUDGES.

FRANCIS M. WRIGHT, Urbana.

EDWARD P. VAIL, Decatur.

WILLIAM G. COCHRAN, Sullivan.

* Laws 1897, 188.

Seventh Circuit.—The counties of Sangamon, Macoupin, Morgan, Scott, Greene and Jersey.

JUDGES.

JAMES A. CREIGHTON, Springfield.
ROBERT B. SHIRLEY, Carlinville.
OWEN P. THOMPSON, Jacksonville.

Eighth Circuit.—The counties of Adams, Schuyler, Mason, Cass, Brown, Pike, Calhoun and Menard.

JUDGES.

JOHN C. BROADY, Quincy.
HARRY HIGBEE, Pittsfield.
THOMAS N. MEHAN, Mason City.

Ninth Circuit.—The counties of Knox, Warren, Henderson, Hancock, McDonough and Fulton.

JUDGES.

JOHN J. GLENN, Monmouth.
GEORGE W. THOMPSON, Galesburg.
JOHN A. GRAY, Canton.

Tenth Circuit.—The counties of Peoria, Marshall, Putnam, Stark and Tazewell.

JUDGES.

LESLIE D. PUTERBAUGH, Peoria.
THEODORE N. GREEN, Pekin.
NICHOLAS E. WORTHINGTON, Peoria.

Eleventh Circuit.—The counties of McLean, Livingston, Logan, Ford and Woodford.

JUDGES.

COLOSTIN D. MYERS, Bloomington.
GEORGE W. PATTON, Pontiac.
JOHN H. MOFFETT, Paxton.

Twelfth Circuit.—The counties of Will, Kankakee and Iroquois.

JUDGES.

DORRANCE DIBELL, Joliet.
ROBERT W. HILSCHER, Watseka.
JOHN SMALL, Kankakee.

Thirteenth Circuit.—The counties of Bureau, LaSalle and Grundy.

JUDGES.

CHARLES BLANCHARD, Ottawa.
HARVEY M. TRIMBLE, Princeton.
SAMUEL C. STOUGH, Morris.

Fourteenth Circuit.—The counties of Rock Island, Mercer, Whiteside and Henry.

JUDGES.

HIRAM BIGELOW, Galva.
WILLIAM H. GEST, Rock Island.
FRANK D. RAMSAY, Morrison.

Fifteenth Circuit.—The counties of Jo Daviess, Stephenson, Carroll, Ogle and Lee.

JUDGES.

RICHARD S. FARRAND, Dixon.
JAMES SHAW, Mount Carroll.
JAMES S. BAUME, Galena.

Sixteenth Circuit.—The counties of Kane, Du Page, De Kalb and Kendall.

JUDGES.

HENRY B. WILLIS, Elgin.
CHARLES A. BISHOP, Sycamore.
GEORGE W. BROWN, Wheaton.

Seventeenth Circuit.—The counties of Winnebago, Boone, McHenry and Lake.

JUDGES.

ARTHUR H. FROST, Rockford.
CHARLES E. FULLER, Belvidere.
CHARLES H. DONNELLY, Woodstock.

(4) COURTS OF COOK COUNTY.

The State Constitution recognizes Cook county as one judicial circuit, and establishes the Circuit, Criminal and Superior Courts of said county. The Criminal Court has the jurisdiction of a Circuit Court in criminal and quasi-criminal cases only, and the judges of the Circuit and Superior Courts are judges, *ex-officio*, of the Criminal Court.

CIRCUIT COURT.

CLERK—John A. Cooke, County Building, Chicago.

JUDGES.

EDWARD F. DUNNE,
MURRAY F. TULEY,
RICHARD S. TUTHILL,
FRANCIS ADAMS,
ARBA N. WATERMAN,
ELBRIDGE HANECEY,
OLIVER H. HORTON,

JOHN GIBBONS,
RICHARD W. CLIFFORD,
THOMAS G. WINDES,
EDMUND W. BURKE,
CHARLES G. NEELY,
FRANK BAKER,
ABNER SMITH.

SUPERIOR COURT.

CLERK—John A. Linn, County Building, Chicago.

JUDGES.

THEODORE BRENTANO,
HENRY M. SHEPARD,
PHILIP STEIN,
JESSE HOLDOM,
JONAS HUTCHINSON,
AXEL CHYTRAU,

ARTHUR H. CHETLAIN,
HENRY V. FREEMAN,
WILLARD M. McEWEN,
FARLIN Q. BALL,
JOSEPH E. GARY,
MARCUS KAVANAGH.

(5) CITY COURTS.

City Courts existing prior to the Constitution of 1870 were continued until abolished by the qualified voters of the city. These courts may now be established under Sec. 21 of Chap. 37, R. S., and when so established have concurrent jurisdiction within the city, with the Circuit Courts, in all civil and criminal cases, except treason and murder, and in appeals from justices of the peace residing within the city. (*Hercules Iron Works v. E., J. & E. Ry. Co.*, 141 Ill. 497.)*

THE CITY COURT OF ALTON.

ALEXANDER W. HOPE, Judge. FRANCIS BRANDEWEIDE, Clerk.

THE CITY COURT OF AURORA.

RUSSELL P. GOODWIN, Judge. FRANK W. GREENAWAY, Clerk.

THE CITY COURT OF CANTON.

P. W. GALLAGHER, Judge. HARRY C. MORAN, Clerk.

THE CITY COURT OF EAST ST. LOUIS.

SILAS COOK, Judge. THOMAS J. HEALY, Clerk.

THE CITY COURT OF ELGIN.

RUSSELL P. GOODWIN, Judge. JOHN J. KELLY, Clerk.

THE CITY COURT OF LITCHFIELD.

PAUL McWILLIAMS, Judge. HUGH HALL, Clerk.

THE CITY COURT OF MATTOON.

LAPSLEY C. HENLY, Judge. THOMAS M. LYTLE, Clerk.

*The act in relation to courts of record in cities, Par. 240 of Ch. 37, Hurd's R. S., 1899, gives city courts jurisdiction in probate matters. *McKinstry v. Elliott*, 89 Ill. App. 599.

(6) COUNTY AND PROBATE COURTS.

In the counties of Cook, Kane, La Salle, Peoria, Sangamon, St. Clair and Will, each having a population of over 70,000, probate courts are established, distinct from the county courts. In the other counties the county courts have jurisdiction in all matters of probate. (Laws 1881, 72.)

JUDGES.	COUNTIES.	COUNTY SEATS.
CHARLES B. MCCRORY.....	Adams.....	Quincy.
WILLIAM S. DEWEY.....	Alexander.....	Cairo.
JOSEPH STORY.....	Bond.....	Greenville.
WM. C. DE WOLF, JR.....	Boone.....	Belvidere.
S. A. HUBBARD.....	Brown.....	Mt. Sterling.
JOE A. DAVIS.....	Bureau.....	Princeton.
F. I. BEZALLION.....	Calhoun.....	Hardin.
ALVA F. WINGERT.....	Carroll.....	Mt. Carroll.
DARIUS N. WALKER.....	Cass.....	Virginia.
CALVIN C. STALEY.....	Champaign.....	Urbana.
JAMES A. FORRESTER.....	Christian.....	Taylorville.
EVERETT CONNELLY.....	Clark.....	Marshall.
JOHN R. BONNEY.....	Clay.....	Louisville.
JAMES ALLEN.....	Clinton.....	Carlyle.
T. N. COFER.....	Coles.....	Charleston.
ORRIN N. CARTER.....	Cook.....	Chicago.
CHARLES S. CUTTING, Pro. J.....	Cook.....	Chicago.
AUSBY L. LOWE.....	Crawford.....	Robinson.
S. B. RARIDEN.....	Cumberland.....	Toledo.
WILLIAM L. POND.....	DeKalb.....	Sycamore.
L. R. HERRICK.....	DeWitt.....	Clinton.
WILLIAM W. REEVES.....	Douglas.....	Tuscola.
LINUS C. RUTH.....	DuPage.....	Wheaton.
WALTER S. LAMON.....	Edgar.....	Paris.
ISAAC W. IBBOTSON.....	Edwards.....	Albion.
DAVID L. WRIGHT.....	Effingham.....	Effingham.
BEVERLY W. HENRY.....	Fayette.....	Vandalia.
H. H. KERR.....	Ford.....	Paxton.
JAMES MOONEYHAM.....	Franklin.....	Benton.
W. SCOTT EDWARDS.....	Fulton.....	Lewistown.
MARSH WISEHEART.....	Gallatin.....	Shawneetown.
DAVID F. KING.....	Greene.....	Carrollton.
GEORGE W. HUSTON.....	Grundy.....	Morris.
CHAS. B. THOMAS.....	Hamilton.....	McLeansboro.
JOHN W. WILLIAMS.....	Hancock.....	Carthage.
MARCELLES TYER.....	Hardin.....	Elizabethtown.
RAUS COOPER.....	Henderson.....	Oquawka.
T. H. CHESLEY.....	Henry.....	Cambridge.
FRANK HARRY.....	Iroquois.....	Watseka.
WILLARD F. ELLIS.....	Jackson.....	Murphysboro.
I. D. SHAMHART.....	Jasper.....	Newton.
CONRAD SCHUEL.....	Jefferson.....	Mt. Vernon.
CHARLES S. WHITE.....	Jersey.....	Jerseyville.
WILLIAM RIPPIN.....	Jo Daviess.....	Galena.
W. Y. SMITH.....	Johnson.....	Vienna.
M. O. SOUTHWORTH.....	Kane.....	Geneva.
JOHN H. WILLIAMS, Pro. J.....	Kane.....	Geneva.
ARTHUR W. DESELM.....	Kankakee.....	Kankakee.
WILLIAM HILL.....	Kendall.....	Yorkville.
J. D. WELSH.....	Knox.....	Galesburg.

JUDGES.	COUNTIES.	COUNTY SEATS.
DEWITT L. JONES.....	Lake.....	Waukegan.
WILLIAM H. HINEBAUGH.....	LaSalle.....	Ottawa.
ALBERT T. LARDIN, Pro. J....	LaSalle.....	Ottawa.
JASPER D. MADDING.....	Lawrence.....	Lawrenceville.
ROBERT H. SCOTT.....	Lee.....	Dixon.
CHARLES F. H. CARRITHERS.....	Livingston.....	Pontiac.
DONALD MCCORMICK.....	Logan.....	Lincoln.
ORPHEUS W. SMITH.....	Macon.....	Decatur.
JOHN B. VAUGHN.....	Macoupin.....	Carlinville.
JOHN F. HILLSKOTTER.....	Madison.....	Edwardsville.
CHAS. H. HOLT.....	Marion.....	Salem.
DANIEL H. GREGG.....	Marshall.....	Lacon.
JAMES A. MCCOMAS.....	Mason.....	Havana.
L. P. OAKES.....	Massac.....	Metropolis.
WILLIAM J. FRANKLIN.....	McDonough.....	Macomb.
ORSON H. GILLMORE.....	McHenry.....	Woodstock.
ROLLAND A. RUSSELL.....	McLean.....	Bloomington.
GEORGE B. WATKINS.....	Menard.....	Petersburg.
WILLIAM T. CHURCH.....	Mercer.....	Aledo.
PAUL C. BREY.....	Monroe.....	Waterloo.
M. J. MCMURRAY.....	Montgomery.....	Hillsboro.
CHARLES A. BARNES.....	Morgan.....	Jacksonville.
E. D. HUTCHINSON.....	Moultrie.....	Sullivan.
FRANK E. REED.....	Ogle.....	Oregon.
GILBERT J. SLEMMONS.....	Peoria.....	Peoria.
MARK M. BASSETT, Pro. J....	Peoria.....	Peoria.
R. W. S. WHEATLY.....	Perry.....	Pinckneyville.
F. M. SHONKWILER.....	Piatt.....	Monticello.
B. T. BRADBURN.....	Pike.....	Pittsfield.
WILLIAM A. WHITESIDE.....	Pope.....	Golconda.
JOHN D. BRISTOW.....	Pulaski.....	Mound City.
HENRY C. MILLS.....	Putnam.....	Hennepin.
LOVEJOY TAYLOR.....	Randolph.....	Chester.
JOHN A. MCNEIL.....	Richland.....	Olney.
ELMER E. PARMENTER.....	Rock Island.....	Rock Island.
JOHN L. THOMPSON.....	Saline.....	Harrisburg.
GEORGE W. MURRAY.....	Sangamon.....	Springfield.
WILLIAM H. GOLBY, Pro. J....	Sangamon.....	Springfield.
H. V. TEEL.....	Schuyler.....	Rushville.
JAMES CALLANS.....	Scott.....	Winchester.
THOMAS H. RIGHTER.....	Shelby.....	Shelbyville.
BRADFORD F. THOMPSON.....	Stark.....	Toulon.
JOHN B. HAY.....	St. Clair.....	Belleville.
FRANK PERRIN, Pro. J....	St. Clair.....	Belleville.
A. J. CLARILY.....	Stephenson.....	Freeport.
JESSE BLACK, JR.....	Tazewell.....	Pekin.
MONROE C. CRAWFORD.....	Union.....	Jonesboro.
J. MURRAY CLARK.....	Vermilion.....	Danville.
LYMAN LEEDS.....	Wabash.....	Mt. Carmel.
T. G. PEACOCK.....	Warren.....	Monmouth.
LEWIS BERNREUTER.....	Washington.....	Nashville.
JOHN R. HOLT.....	Wayne.....	Fairfield.
JOHN N. WILSON.....	White.....	Carmi.
HENRY C. WARD.....	Whiteside.....	Morrison.
DWIGHT C. HAVEN.....	Will.....	Joliet.
JOHN B. FITHIAN, Pro. J....	Will.....	Joliet.
RUFUS NEELEY.....	Williamson.....	Marion.
RUFUS C. BAILEY.....	Winnebago.....	Rockford.
THOMAS KENNEDY.....	Woodford.....	Eureka.

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Williamson County v. Farson, Leach & Co.,	101 Ill. App. 328
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Willis Coal and Mining Co. v. Grizzell....	100 Ill. App. 480
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CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

SECOND DISTRICT—APRIL TERM, 1902.

Chicago & Milwaukee Electric Ry. Co. v. Clara Krempel.

1. **INSTRUCTIONS**—*Injury to Personal Appearance and Physical and Mental Suffering as Elements of Damages.*—An instruction which tells the jury that in estimating plaintiff's damages, they should consider, among other things, to what extent she had been injured or marred in her personal appearance, and to what extent, if any, she may have endured physical and mental suffering as a natural and inevitable result of such injuries, also any necessary expenses she may have been to, or may hereafter become liable to pay in or about caring for and curing herself, is proper.

2. **SAME**—*Effect of Injuries upon Ability to Perform Ordinary Labor.*—An instruction authorizing the jury to consider what effect such injuries might have upon plaintiff in the future in respect to ability to perform ordinary work, is proper. The loss of her ability to do work is a personal injury to her which may affect her in many ways peculiar to herself.

Action in Case, for personal injuries. Appeal from the Circuit Court of Lake County; the Hon. CHARLES H. DONNELLY, Judge presiding. Heard in this court at the April term, 1902. Affirmed. Opinion filed July 18, 1902.

ALEXANDER CLARK, attorney for appellant.

JAMES J. BARBOUR, attorney for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.
This is a suit by appellee, a married woman, to recover

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damages for personal injuries sustained by her in a collision between two of appellant's cars. Appellee, a passenger, was thrown violently from her seat by the force of the collision and the injuries received by her were of a very serious character. Two of her teeth were loosened and had to be removed; she was severely bruised about the head, breast and shoulder; she received a cut across the forehead two and one-fourth inches long, from which a permanent scar remains; the vision of one eye was nearly destroyed, her mental and nervous system seriously affected, and since then she suffers from acute hysteria. Prior to the accident appellee was a strong, healthy woman. There was a verdict and judgment in favor of appellee for \$2,500. There is no contention that the injuries were not received, that they were not caused through the negligence of appellant's servants or that the verdict is excessive, but appellant asks for a reversal upon the ground that the court erred in giving one of the instructions for appellee, and refusing to give one offered by appellant.

The instruction given for appellee which is complained of, told the jury that in estimating plaintiff's damages, they could consider among other things to what extent she had been injured or marred in her personal appearance, and to what extent, if any, she may have endured physical and mental suffering as a natural and inevitable result of such injuries; also any necessary expenses she may have been to or may hereafter become liable to pay in and about caring for and curing herself. In *I. C. R. R. Co. v. Cole*, 165 Ill. 334, an instruction using language almost identical with that complained of, was approved by the court and the instruction said by the court to state correct principles of law. Appellant claims, however, that there was no evidence of expenses incurred or to be incurred for medical services. This claim is without foundation, as an examination of the record shows ample evidence of expenses incurred by appellee for physician's bills, and also that there was necessity to incur future expenses in perfecting a cure. The instruction was therefore properly given.

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The instruction also authorized the jury to consider what effect such injuries might have upon appellee in the future in respect to ability to perform ordinary labor. Appellant claims that the services of the wife belong to the husband; that therefore in a suit by the wife no recovery can be had for damages arising out of the inability to perform ordinary work. In *West Chicago Street Ry. Co. v. Carr*, 170 Ill. 478, an instruction was sustained, while not altogether approved by the court, which authorized a jury to award a married woman damages for loss of time. If such an instruction could be sustained, there is more reason why the one under consideration here should be approved. This allows the jury to take into consideration the effect of the injuries upon the ability of appellee to perform ordinary labor in the future. The loss of her ability to so work is a personal injury to her which may affect her in many ways peculiar to herself. We can not assume that if not injured she might not hereafter find it necessary, for support of herself, or other reasons, to perform work other than ordinary household work. We think the instruction was properly given.

The instruction complained of as refused for appellant, stated that "even although plaintiff was injured as alleged in this case, no recovery can be had for mental suffering caused by shame and mortification, arising out of the contemplation of her physical condition." This instruction was, we think, fully covered by instruction No. 6 given for appellant and there could be no error in refusing a second instruction upon the same subject. But even if there had been no instruction given upon the subject, the refusal of the one in question would not have warranted a reversal of the case for the reason that the liability of appellant was unquestioned, the injuries received by appellee were severe, the amount of damages allowed by the jury exceedingly small under the circumstances, and no further trial of the case could rightly result in favor of appellant. The judgment of the court below is affirmed.

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John Daum v. Ira Cooper.

1. COMMISSIONERS OF HIGHWAYS—*Rules of Government in Changing Course of Drains.*—Highway commissioners are governed by the same rules as adjoining land owners in changing the courses of drains.

2. SAME—*Drains Constructed by License—Secs. 1 and 3, Act of 1899.*—Whenever any ditch or drain, either open or covered, has been heretofore or shall be hereafter constructed by mutual license, consent or agreement of the owner or owners of adjoining or adjacent lands, either separately or jointly, so as to make a continuous line upon, over or across the lands of said several owners, or where the owner or owners of adjoining or adjacent lands shall hereafter, by mutual license, consent or agreement, be permitted to connect a drain with another already so constructed, or where the owner or owners of the lower lands have heretofore or shall hereafter connect a drain to a drain constructed by the owner or owners of the upper lands, then such drains shall be held to be a drain for the mutual benefit of all the lands so interested therein. Whenever drains have been or shall be constructed in accordance with this act, none of the parties interested therein shall, without the consent of all the parties, fill the same up, or in any manner interfere with the same so as to obstruct the flow of water therein; and the license, consent or agreement of the parties herein mentioned need not be in writing, but shall be as valid and binding if in parol as in writing, and may be inferred from the acquiescence of the parties in the construction of such drain.

3. SAME—*Right to Revoke Oral License.*—The right to revoke any such oral license shall be exercised within one year.

4. WATERCOURSES—*Right of Owner of Dominant Estate to Cast Water upon Servient Estate.*—The owner of the dominant estate has the right to collect water and cast it in increased volume upon the land of another so long as it is confined to its natural channel.

Action on the Case, for damages done by diverting a watercourse. Appeal from the Circuit Court of Lee County; the Hon. JAMES SHAW, Judge presiding. Heard in this court at the April term, 1902. Affirmed. Opinion filed July 18, 1902.

O'BRIEN & McHENRY and HENRY S. DIXON, attorneys for appellant.

D. W. BAXTER and R. S. FARRAND, attorneys for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

This was an action on the case brought by Cooper against Daum, in which Cooper recovered judgment for

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§25, from which Daum appeals. The original declaration contained one count, and an additional count was filed later. A special finding by the jury was practically against plaintiff as to the additional count, so that only the original declaration need be considered. It charges the plaintiff owned certain real estate in Alto township in Lee county; that defendant, a commissioner of highways in said town, for the purpose of injuring plaintiff's lands, cut certain ditches across a certain highway and put culverts therein, and took out certain culverts across said highway, and thereby caused water to flow upon plaintiff's lands and damage plaintiff's lands and buildings, and thereby caused rain, standing and surface water, to flow in a different direction and channel, and with much greater force and violence than it of right ought to have and otherwise would have done upon plaintiff's lands, and damaged them. The plea was not guilty.

There is very little conflict as to the main facts. Cooper owned the northeast quarter of section 29. A highway ran north and south through the center of the quarter section, and an east and west highway ran along its north line. Cooper's residence and farm buildings were just south of said east and west road on the west side of the north and south road. James Smith owned the land north of Cooper on both sides of the north and south road. Daum owned the land south of Cooper, west of the north and south road. The general course of the water over these lands is southwesterly. In a state of nature the water rising on Smith's land east of the north and south road, and the water coming from lands northeast of his, passed across said road at two places and went west some seventy rods on Smith's land, and then turned south and ran southerly across the east and west road some seventy rods west of Cooper's corner, and across Cooper's land and to and upon Daum's land. The water from Cooper's land east of the road passed in a state of nature across said road at points 400, 700, 1,000 and 1,950 feet south of Cooper's corner and passed westerly and southwesterly and then southerly over his land west of the road and then to and upon Daum's land.

Some eighteen or nineteen years before this suit was begun the highway commissioners graded said north and south road between said Smith lands and cut a ditch on the east side of the pike or grade and thereby brought to the corner where the Cooper residence was the water coming from Smith's land east of the road and from other lands northeast of his, all which water in a state of nature would have passed about seventy rods west of that road over Smith's land and then would have turned south and crossed the east and west road about seventy rods west of Cooper's home buildings. The commissioners placed a culvert in the north and south road, on the north side of the east and west road, to conduct this water across to the west side of the north and south road, but there was no ditch on the east and west road to carry the water west to the depression seventy rods west of that corner, nor any pike to restrain the water from flowing upon Cooper's lands at that corner where his farm buildings were, and it did so flow where it never flowed in a state of nature. To avoid this injurious result Cooper, at his own expense, made the following changes in the road: He took out the culvert on the north side of said east and west road which conducted said waters to the west side of said north and south road; he cut through the east and west road on the east side of the north and south road and placed a culvert there, thus conducting said waters across the north and south road, and he carried said waters south along a ditch on the east side of said north and south road for about 1,400 feet south from said corner. At that point he placed a culvert in said north and south road and carried said waters to the west side of said road, and then carried them in the ditch on the west side of said road south to his south line. He placed a culvert in said road 1,950 feet south of the corner to conduct other waters from the east to the west side of the road. He also put an eight-foot culvert across the highway at his south line to carry to the west side of the road waters collecting in the ditch on the east side of the road at that point, and he dug a ditch along his south line west of the

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road which carried all said waters on his own land west to the point where in a state of nature they all passed upon Daum's land, and there discharged said waters in their natural course. He also built banks along the bench on the west side of the north and south road at certain places to prevent the water in the west ditch flowing upon his land. The effect of these changes made by Cooper was that all the waters from Smith's lands east of the road and from lands northeast of Smith, which the highway commissioners had brought to his corner and discharged upon his land where his home buildings were, contrary to the natural course thereof, and all the waters flowing in the course of nature at various points from Cooper's land east of the road to and over his lands west of the road, were collected in said road ditches and carried to his south line and there carried west to the depression where, in the course of nature, all said waters flowed upon Daum's land. Cooper thus avoided the injury the commissioners had inflicted upon him and further benefited his own land. As he owned the land on both sides of the road the work was done on land in which he owned the fee, subject to the public use. He made these changes about fifteen years before the grievances herein complained of. Plaintiff offered to prove he had permission from the highway commissioners to do this work, but an objection thereto was sustained because he did not offer to show that fact by their record. It does not appear that the commissioners as a body have ever made any objection to the course pursued by Cooper, but apparently they have ever since acquiesced therein and are still content with that method of conducting the water. Daum has been a highway commissioner many years, and seems to have been commissioner when the work injurious to Cooper was originally done on the highway between the Smith lands. About two years after Cooper made these improvements Daum started to take out the culvert Cooper had placed across the east and west road at the corner, but Cooper asked him if he had the consent of the other commissioners and he said he had not, and Cooper told him he

put it in under a permit from the other commissioners and forbade Daum taking out the culvert without the action of the other commissioners, and Daum then desisted. Up to the time of the acts by Daum here complained of, nothing appears showing that the commissioners, as a body, or the majority of them, either by any recorded action or in any other manner, ever questioned the improvements Cooper had made. Upon this record the commissioners, as a body, must be deemed to have acquiesced therein.

Beginning in the fall of 1899, Daum made the following changes in the system constructed by Cooper and which had been in force for fifteen years: He took out the eight-foot culvert in the road at the south line of Cooper's land, and put in a twenty-inch tile at that point. He removed the culvert Cooper had placed in the road 1,400 feet south of the corner, and instead placed a culvert in the road 1,000 feet south of the corner, or 400 feet nearer Cooper's farm buildings. He closed the culvert 1,950 feet south of the corner. He took out the culvert at the corner crossing the east and west road on the east side of the north and south road, and thus stopped the flow south of the waters from the Smith land and northeast thereof, and placed a culvert in the north and south road on the north side of the east and west road, thus carrying said waters through the north and south road and discharging them on the north side of the east and west road where there was no ditch sufficient to carry them west seventy rods to their natural course, nor any turnpike sufficient to prevent their passing south to Cooper's home and buildings, as they did. It is clear these acts injured Cooper's property.

Daum claims that the fact he was a highway commissioner at the time was a complete defense. He was but one of three. He does not claim the board, as a body, or any one of his associates, even orally, ever authorized him to do the acts complained of and to destroy the drainage system which Cooper had constructed at his own expense and with such long acquiescence by the commissioners. Daum argues he turned this water into what was originally

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its natural course, which is true in part. But the commissioners as a body had not decided this should be done. Daum was only the minority, and could not act as the majority. The board itself could not have done this without going further and restoring to its original course the waters from the Smith land and northeast thereof, which originally went nearly seventy rods west of the highway, much of it at a point far north of Cooper's land, before turning south, and which the highway commissioners nineteen years before had brought down the road to Cooper's corner, discharging it upon Cooper's land where his home was. Daum undertook to set aside the corrective Cooper had applied, while leaving in full force the original wrong the commissioners had done Cooper. If Daum had restored to its original course the waters which the commissioners had diverted therefrom, much of the injury here complained of would not have occurred. Again the commissioners are governed by the same rules as adjoining land owners. (*Young v. Commissioners of Highways*, 134 Ill. 569.) Sections 1 and 3 of the act of 1889 relating to drains constructed by license are as follows:

"Section 1. That whenever any ditch or drain, either open or covered, has been heretofore or shall be hereafter constructed by mutual license, consent or agreement of the owner or owners of adjoining or adjacent lands, either separately or jointly, so as to make a continuous line upon, over or across the lands of said several owners, or where the owner or owners of adjoining or adjacent lands shall hereafter by mutual license, consent or agreement, be permitted to connect a drain with another already so constructed, or where the owner or owners of the lower lands has heretofore or shall hereafter connect a drain to a drain constructed by the owner or owners of the upper lands, then such drain shall be held to be a drain for the mutual benefit of all the lands so interested therein.

Section 3. Whenever drains have been or shall be constructed in accordance with this act, none of the parties interested therein shall, without the consent of all the parties, fill the same up or in any manner interfere with the same so as to obstruct the flow of water therein; and the license, consent or agreement of the parties herein men-

tioned need not be in writing, but shall be as valid and binding if in parol as in writing, and may be inferred from the acquiescence of the parties in the construction of such drain."

Section 4 requires that the right to revoke any such oral license shall be exercised within one year. If this act controls highway commissioners as it does private owners, then this system of drainage had become an established right by long acquiescence. Even if public necessity and the security of the highway might authorize the highway commissioners to make changes, yet that could not be done till the necessity arose. The first change complained of was made by Daum without any pretense that the condition of the highway required it. Before the other changes were made there had been a slight washout in the highway, easily repaired, and perhaps attributable to the change Daum had already made. There is no reasonable claim that the state of the highway demanded these changes, and the commissioners had not, nor had the majority of them ever so decided. We conclude Daum's position as a highway commissioner was not a justification.

We think it obvious that Daum made these changes for the benefit of his own land, south of Cooper's land and west of the road. Was he justified by his position as a servient proprietor? The ditches and culverts constructed by Cooper brought all this water to Daum's land at the place where, in a state of nature, his land had always received it, but it brought it there more swiftly; and if the water had spread out over Cooper's land first, some of it would have evaporated or seeped into the soil. That Cooper had a right to collect the water and cast it upon Daum's land in its natural channel or course more rapidly and in greater quantity than in a state of nature, was determined in *Peck v. Herrington*, 109 Ill. 611. The manner in which Cooper conducted the water over his own land before it reached Daum's land was a matter of no concern to Daum as a mere private citizen and owner of the servient heritage, so long as it reached Daum's land in the same course where, in a state of nature, said water was accustomed to flow.

City of Elgin v. Nofs.

We find no reversible error in the instructions given for plaintiff, when considered as a series, though the first is somewhat confusing. So far as the instructions given at defendant's request conflict with those given for plaintiff, those given for defendant are incorrect; but of that defendant can not be heard to complain.

The judgment is affirmed.

The City of Elgin v. Louis A. Nofs.

1. PRACTICE—*Incorporating Matter in the Record by Ex parte Affidavit.*—What is done by the judge, or what occurs in his presence, is within his knowledge and must be recited over his certificate, and can not be made a part of the record by *ex parte* affidavits.

2. DAMAGES—*When \$15,000 is Not Excessive.*—Plaintiff was at the time he was injured, a man thirty-six years of age, of good health, about six feet tall and weighed about 195 pounds. He was in the employ of the city railway company, receiving as wages \$1.65 a day for each day of the week, and he had before him the prospect of a useful and prosperous life. By reason of the injuries complained of he suffered severe pain, is permanently paralyzed from below his waist so as to be unfitted for the employment to which he is accustomed or for any active work, and must go through life as an almost hopeless cripple. *Held*, \$15,000 damages are not so large as to show passion or prejudice on the part of the jury.

Action on the Case, for personal injury. Appeal from the Circuit Court of Kane County: the Hon. CHARLES A. BISHOP, Judge presiding. Heard in this court at the April term, 1902. Affirmed. Opinion filed July 18, 1902.

CHARLES H. FISHER, corporation counsel, ROY R. PHILLIPS, city attorney, and R. N. BOTSFORD, of counsel, for appellant.

RUSSELL & HAZELHURST and R. S. EGAN, attorneys for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This was a suit brought by appellee against appellant to recover damages for injuries sustained by him in falling

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108	11
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through a sidewalk on a bridge over the Fox River, within the corporate limits of the city of Elgin. This is the second time this case has been in this court. At the first trial there was a judgment in the court below in favor of Nofs for \$10,000, which was reversed by this court and the cause remanded. (*City of Elgin v. Nofs*, 96 Ill. App. 291.) Upon the second trial appellee recovered a judgment for \$15,000, from which the city appeals. No instructions were offered by appellee, and all those offered by appellant were given without modification.

The grounds urged for reversing the judgment are: (1) that the verdict was not sustained by the evidence; (2) that the court erred in permitting certain of appellee's witnesses too great latitude in testifying as to the condition of the sidewalk where appellee was injured, both as to time and place, and (3) that the amount of the verdict was excessive.

An appropriate declaration charging negligence on the part of appellant in regard to the sidewalk in question, and due care on the part of appellee, was filed, and the general issue pleaded.

Shortly before noon on March 27, 1900, as appellee, who was a car starter and transfer man for the city railway, was returning from dinner to his place of business, he started to walk across the sidewalk on the south side of the Fox River bridge. The bridge in question is constructed in two sections, divided by an island. The west section, upon which appellee was injured, is about 200 feet long. When he had proceeded a short distance he stepped upon a plank which gave way beneath him, and fell into the hole made by its displacement, catching on the walk at his waist. He was severely bruised, but the most serious injury was to his spine, by reason of which he has since become paralyzed from the waist down, with little or no chance of recovery. On the trial seven witnesses gave evidence for appellant tending to show that the walk was in a fairly good condition up to the time appellee was injured, or that its condition, if defective, was such that the city could not, by the exercise of reasonable diligence, have ascertained the true facts and made repairs.

City of Elgin v. Nofs.

Twenty-one witnesses on the part of appellee, however, swore positively that the walk at that particular location was, at the time in question, and had been for a long time prior thereto, in a very unsafe and defective condition. There was evidence tending to show that the city had actual notice of the unsafe condition of the walk, and if not, the overwhelming weight of the proof was, that the city could have known of the condition of the walk by the exercise of ordinary diligence, and have repaired the same before appellee was injured.

It also appears from the evidence that at the time he was injured appellee was walking on the sidewalk at an ordinary gait, observing due care for his own safety. We think the evidence was abundantly sufficient to sustain the verdict.

We find no serious objection to the admission of the testimony on the part of appellee, complained of by appellant. The stringers of the walk at the place where the injury occurred, were brought into court and introduced in evidence by appellant, and the court afterward permitted the jury, over the objection of appellant, to examine the same with a magnifying glass. There was a question as to whether the stringers produced in court were really taken from the walk at the place where the injury occurred, and the use of the glass was permitted, not for the purpose of showing that the stringers were rotten or imperfect, but to show the manner in which they had been sawed through, as bearing upon said question, and while the court might properly have refused the use of the magnifying glass, we do not think its use by the jury reversible error.

On the former trial witnesses were permitted to testify as to the unsafe condition of the sidewalk generally, and it was for that reason and on account of an erroneous instruction given for appellee, this court reversed the judgment. Upon this trial the testimony was confined by the trial court, in compliance with directions given by this court in reversing the former judgment, to the place in the walk in question where the injury occurred, and its immediate vicinity. It is true that the damages allowed by the jury

are large, but appellee was at the time he was injured a man thirty-six years of age, of good health, about six feet tall and weighed about 195 pounds. He was, and had been for some years, in the employ of the City Railway Company, receiving as wages \$1.65 a day for each day of the week, and he had before him the prospect of a useful and prosperous life. By reason of the injuries complained of he suffered severe pain, is permanently paralyzed below his waist so as to be unfitted for the employment to which he is accustomed, or for any active work, and he must go through life as an almost helpless cripple. In view of all these circumstances, we can not say that the damages were so large as to show passion or prejudice on the part of the jury.

In support of the motion for a new trial, affidavits were introduced by appellant tending to show that one of the jurors had made false statements regarding his qualifications as a juror, in answer to a question by appellant's counsel as to whether the juror had ever had a case of personal injury himself. The questions propounded to the jurors were not preserved by stenographic notes and the affidavits offered on the part of appellant were contradicted by others on the part of appellee, denying that any such questions were asked the juror as those alleged to have been asked him in the affidavit presented by appellant. There was no certificate of the presiding judge as to the questions asked the jurors and the affidavits being contradictory, we can not determine satisfactorily just what questions were asked. Had appellant desired to preserve them, he should have had the certificate of the judge as to the questions asked.

"What is done by the judge, or what occurs in his presence, is within his knowledge and must be recited over his certificate and can not be made a part of the record by *ex parte* affidavits." *Peyton v. Morgan Park*, 172 Ill. 102; *Auburn Cycle Co. v. Foote*, 69 Ill. App. 644.

We can not say that the record presents satisfactory reasons for holding that the juror in question was disqualified.

The judgment of the court below will be affirmed.

Central Ry. Co. v. Michael Mackey.

1. **INSTRUCTIONS—*Removing Drunken Passenger from Street Car.***—An instruction which tells the jury that if the plaintiff was under the influence of liquor at the time in question, and the conductor of the street car undertook to remove him because he did not pay his fare, it was the duty of the conductor to act in a prudent manner in removing him, using no more force than was necessary, and if he failed to do so, and plaintiff was thereby injured, defendant would be liable for the injury, is proper.

2. **SAME—*Contributory Negligence of Drunken Person.***—An instruction which tells the jury that if at the time of the accident and injury complained of, plaintiff was in such a state of intoxication as to render him mentally incapable of ordinary care and caution for his own personal safety, or that by reason of such state of intoxication he contributed to the injuries complained of, he could not recover, is erroneous. Under this instruction it would be necessary for defendant to show only that plaintiff was so intoxicated as to be unable to look after his own safety to relieve it from all responsibility.

Action on the Case, for personal injuries. Appeal from the Circuit Court of Peoria County; the Hon. LESLIE D. PUTERBAUGH, Judge presiding. Heard in this court at the April term, 1902. Affirmed. Opinion filed July 18, 1902.

I. C. PINKNEY, attorney for appellant.

ISAAC C. EDWARDS and JOSEPH WILHELM, attorneys for appellee; D. E. CONIGISKY, of counsel.

MR. JUSTICE HIGBEE delivered the opinion of the court.

On the evening of September 1, 1900, appellee was riding on a street car of appellant in the city of Peoria. He was at the time intoxicated. When the conductor asked him for his fare, appellee placed his hand in his pocket, but as he did not produce it right away, the conductor passed on and afterward came to him a second time. At the second call there were some words between appellee and the conductor and the former raised himself, with his right hand in his pocket as though endeavoring to get his fare. Suddenly he either fell off the car or was pushed off by the conductor and received serious injuries for which

he brought this suit. At that time the car was not in motion, having stopped for a passenger to get on. The declaration, consisting of two counts, charged that the defendant, by its agents and servants, violently assaulted the plaintiff and with great force and violence threw him from the car.

A plea of the general issue was filed. The case has been twice tried. At the first trial there was a verdict for appellee for \$625. A motion for a new trial was sustained and at the second trial there was a verdict for \$650, for which judgment was entered.

Appellant complains that the evidence was not sufficient to sustain the verdict and that the court erred in giving one instruction for appellee and refusing one offered by appellant. Seven witnesses, including appellee himself, testified that the conductor pushed or threw appellee off the car. All of these witnesses but appellee appear to be absolutely disinterested. Three witnesses testified that the conductor did not push appellee off the car, but that the latter fell off. There is nothing in the record to show that the witnesses testifying on behalf of appellee were not fully as worthy of credit as those testifying for appellant. In this condition of the proof we can not say that the jury erred in believing the majority of the witnesses and that they should have found the other way.

The instruction complained of as given for appellee, told the jury that if the plaintiff was under the influence of liquor at the time in question, and the conductor of the street car undertook to remove him because he did not pay his fare, it was the duty of the conductor to act in a prudent manner in removing him, using no more force than was necessary, and if he failed to do so, and appellee was thereby injured, appellant would be liable for the injury. Under the declaration in this case charging that appellee's injuries were caused by a violent assault made upon him by appellant's servants, and the evidence introduced in support of the same, we think the instruction was entirely proper. The instruction refused for appellant announced

as a rule of law that if at the time of the accident and injury complained of, appellee was in such a state of intoxication as to render him mentally incapable of ordinary care and caution for his own personal safety, or that by reason of such state of intoxication he contributed to the injuries complained of, he could not recover. Under this instruction it would have only been necessary for appellant to show that appellee was so intoxicated as to be unable to look after his own safety to relieve it from all responsibility, even if a willful assault was made upon appellee by one of its servants. The instruction did not state a correct principle of law and was properly refused. The judgment of the court below will be affirmed.

Central Ry. Co. v. William F. Mehlenbeck.

1. VERDICT—*Where Evidence is Conflicting.*—Where the evidence is conflicting the court may properly refuse to direct a verdict.

Action on the Case, for personal injuries. Appeal from the Circuit Court of Peoria County; the Hon. LESLIE D. PUTERBAUGH, Judge presiding. Heard in this court at the April term, 1902. Affirmed. Opinion filed July 18, 1902.

I. C. PINKNEY, attorney for appellant.

PAGE, WEAD & ROSS, attorneys for appellees.

MR. JUSTICE DIBELL delivered the opinion of the court.

This was a suit by William F. Mehlenbeck against the Central Railway Company, operating a street car line in Peoria, to recover damages for personal injuries sustained by him. He recovered a verdict and a judgment for \$237.50, which was slight compensation for the injuries sustained. Defendant appeals, and denies it is liable under the proof.

Plaintiff was a passenger upon an open trailer. As the car approached the street where he wished to alight he arose from the seat and tried to attract the attention of the

conductor, who was talking to some ladies. Several other passengers wished to leave the car at the same street, and one or more of them also tried to get the attention of the conductor. The car passed the street without stopping. Plaintiff's proof tended to show that soon after passing the street the car slackened speed, and he thought it was going to stop, and he got down on the foot board so as to be ready to get off, and was holding on by both hands when the car gave a sudden jerk and he was thrown off backward and fell upon the brick pavement, receiving the injuries complained of. Defendant's proof tended to show that the car did not slack up nor give a jerk, but that plaintiff stepped off while the car was moving swiftly, and that his injuries resulted from his own negligence in voluntarily leaving a moving car. The proof on this subject was conflicting. It would not warrant our holding that the jury ought to have believed defendant's witnesses instead of plaintiff's, or that another jury would be likely to do so. We can not say the record conclusively shows plaintiff was negligent or defendant free from negligence. The court properly refused to direct a verdict for defendant.

A few days after the injury plaintiff told his wife to write to the company to send some one up to see him, to see the condition he was in. Mrs. Mehlenbeck got a neighbor to write a letter and sign her name to it, and it was sent to the company. The letter undertook to state how plaintiff received his injuries, and it would have supported defendant's claim, rather than plaintiff's. Defendant offered the letter in evidence and also sought to prove what Mrs. Mehlenbeck said to the neighbor at the time he wrote the letter. The letter was not written in plaintiff's presence, and he did not see it after it was written, nor did he talk with or see the scrivener at the time it was written. Plaintiff did not authorize his wife to state the facts to the company, and he was not bound either by what she said to the scrivener or by what he stated in the letter. The testimony offered was incompetent.

The first refused instruction was embodied in another given at defendant's request. The judgment is affirmed.

J. K. Comstock v. Henry Price.

1. INSTRUCTIONS—*Failure to State Rules of Law Whereby Damages Are to Be Assessed.*—Instructions which do not state the rules of law by which plaintiff's damages are to be assessed, but leave the jury to judge what were the proper elements of damage, and open before them the field of speculation and conjecture, are erroneous.

2. SALES—*Resources of Vendor Where Goods Are Not Accepted.*—Where the goods sold are not accepted the vendor may pursue any one of three courses: First, he may store the goods for the vendee, give notice that he has done so, and then recover the full contract price; second, he may keep the goods, and recover the excess of the contract price over and above the market price at the time and place of delivery; third, he may sell the goods to the best advantage, and recover of the vendee the loss if the goods fail to bring the contract price.

Assumpsit, for goods sold and delivered. Appeal from the Circuit Court of Knox County; the Hon. JOHN A. GRAY, Judge presiding. Heard in this court at the April term, 1902. Reversed and remanded. Opinion filed July 18, 1902.

EDWARD J. KING, attorney for appellant.

ARNOLD & GALE, attorneys for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

In 1898 Price owned a large farm at Kenton, Ohio, where he raised onions and other produce for sale and shipment in bulk. Comstock was in the wholesale fruit and produce business at Galesburg, Illinois, buying and selling on his own account. In October, 1898, Comstock and Price had correspondence by letters and telegrams concerning a car load of onions. Part of the correspondence was lost and was proved orally, with some disagreement as to the terms of the lost correspondence. It seems, however, that Comstock ordered and Price shipped to him a car load of onions, containing 543 bushels, which were to be fancy red onions, at either thirty-eight or forty cents per bushel. Price shipped the onions on November 2, 1898, by rail at Alger, Ohio, consigned to Comstock at Galesburg. The car reached Galesburg on November 7th. Comstock exam-

ined the onions at four p. m. that day, and next morning wired Price that the onions were undersized and mixed, and he could not accept them, and asked what disposition he should make of them. On the same day Comstock wrote Price, giving his objections more fully. Correspondence followed, Price trying to induce Comstock to take them, and Comstock offering to sell them on Price's account. A few days later it became necessary to make some disposition of the car, and the railroad agent at Alger, acting after a conversation with Price, ordered the car shipped to commission men at Peoria who had previously sold goods on commission for Price, and the car was shipped to Peoria and the onions were there sold. Price then brought this suit against Comstock to recover damages for a breach of the contract, and obtained a verdict and a judgment for \$175. Comstock appeals.

The main controversy was whether the goods shipped complied with the contract, so that Comstock violated his contract when he refused to accept and pay for them. Plaintiff produced a number of witnesses to show that the onions shipped complied with the contract, and defendant produced about an equal number of witnesses to show the onions received did not comply with the contract. This proof was so nearly evenly balanced that a verdict either way on that subject, approved by the trial judge, ought not to be disturbed on appeal as not supported by the evidence.

The record presents the further question whether the jury were properly instructed as to the measure of damages. The rules laid down were that if plaintiff recovered he was entitled to such an amount as the jury believed from all the evidence plaintiff had been damaged by the failure and refusal of defendant to accept and pay for the onions; and to such an amount as they believed from all the evidence he was entitled to by reason of the failure of defendant to accept and pay for the onions. These instructions did not state the rules of law by which plaintiff's damages were to be assessed, but left the jury to judge

what were proper elements of damage, and opened before them the field of speculation and conjecture, and under the facts in this case we regard them as erroneous. (*Ayer v. Mead*, 13 Ill. App. 625.) No other instruction gave the jury the law governing the measure of damages.

It remains to inquire whether the verdict is so clearly correct in amount that the error just stated does not require a reversal. In a case like this the vendor may pursue any one of three courses:

"First, the vendor may store the goods for the vendee, give notice that he has done so, and then recover the full contract price; second, he may keep the goods, and recover the excess of the contract price over and above the market price at the time and place of delivery; third, the vendor may sell the goods to the best advantage, and recover of the vendee the loss, if the goods fail to bring the contract price." *Ames v. Moir*, 130 Ill. 582; *Trunkay v. Hedstrom*, 131 Ill. 204.

Price did not pursue the first course. If, under the proofs, he could be considered as having pursued the second, and if Kenton, Ohio, was the place of delivery, the proof is the goods were worth the contract price there; and if Galesburg be considered the place of delivery, the proof is that fancy red onions were worth there the contract price or more; so that Price could only have lost the freight charges from Alger to Galesburg, and that sum is not proved. But Price apparently adopted the third remedy above stated. In that view of the case, we regard his proof as insufficient to show how much he ought to recover. He did not prove the goods could not have been sold at Galesburg. He employed an agent there to see if he could sell them, and Price testified such agent reported he was making progress, before the car was ordered to Peoria. That agent was not a witness. There is no proof Peoria was the best or nearest market in which to sell the onions. There is no proof they were sold to the best advantage at Peoria, nor what efforts were made to sell them there. Indeed, Price testified the man who sold them for him in Peoria was a "commission

thief," and implied the goods were not properly handled and disposed of there. If this is true, the loss should not fall upon Comstock. Price did not prove in chief what he got for the onions at Peoria, but only that the commission merchants who handled them demanded of him \$57 over and above what they got for the onions. Defendant called one of these commission men as a witness as to the kind and quality of the onions in the car, and on cross-examination plaintiff proved by him that the freight on the car and the charges amounted to \$108, and that they did not get that money back within \$59. But plaintiff did not prove how much of the \$108 was freight and how much was "charges," nor what those charges were for, nor by whom imposed, nor that they were reasonable and necessary charges. As plaintiff did not prove that he sold the goods to the best advantage, nor show what he received, nor what the necessary and proper expenses were attending such sale, he did not furnish a basis by which the damages could be estimated.

Defendant claims the goods reached Comstock over a different railroad from that designated in his order, and that this fact was a complete defense. The order was lost, and plaintiff denies it designated the railroad. Be that as it may, defendant did not base his refusal to receive the goods upon the failure to ship by the proper road, and can not now rely upon that fact.

The judgment is reversed and the cause remanded for a new trial.

Thomas Colwell et al. v. Sarah E. Brown.

1. *CONTRACTS—Private Oral Statements Merged in Written Contract.*—Where a contract is in writing and there is nothing ambiguous or uncertain in its terms, evidence of prior conversations limiting meaning of the written contract is inadmissible.

2. *BILL OF PARTICULARS—Restrictive of the Right of Recovery Stated in Declaration.*—A bill of particulars is restrictive of the right of recovery stated in a declaration, and it is error to admit proof of a cause of action or damages not therein specified.

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3. INSTRUCTIONS—*Ignoring Plea of Set-off.*—It is error to instruct the jury to find their verdict for the plaintiff provided they find certain facts stated in the instruction to exist, thus ignoring a plea of set-off under which the jury might have found for the defendant a larger sum than plaintiff was entitled to under the declaration.

Assumpsit, on building contract. Appeal from the Circuit Court of LaSalle County; the Hon. CHARLES BLANCHARD, Judge presiding. Heard in this court at the April term, 1902. Reversed and remanded. Opinion filed July 18, 1902.

BUTTERS & CARR, attorneys for appellants.

JAMES J. CONWAY, attorney for appellee.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

The appellants, who were the defendants in the court below, entered into a written contract with appellee to remove an old house, build a kitchen thereto, and to erect a new house, according to certain plans and specifications, for \$1,227. Appellants claim there was extra work and material furnished, amounting to \$54.80, after giving credit for \$14.70 for an item included in the original contract which they claimed was omitted by agreement. Appellee paid \$1,240 as the work progressed, and then brought this suit to recover damages from the appellants for alleged failure to construct the building according to contract. Appellee, on motion of appellants, filed a bill of particulars of the damages claimed under the declaration. The appellants demurred to the declaration; the court overruled the demurrer as to each count. The appellants stood by their demurrer as to one count of the declaration, and pleaded the general issue as to the others and set-off for the extra work and materials furnished. A trial resulted in the plaintiff recovering a verdict and judgment for \$600. The defendants appeal.

The contract was in writing and specified the character of the material to be furnished and the work to be performed. There is nothing ambiguous or uncertain in its terms. It contains no provision or inference that the building is to be similar to any other in interior finish or other

respects. Yet, notwithstanding that fact, the trial court, over the objections of the defendants, permitted the plaintiff to testify that prior to the execution of the contract, in a conversation between the parties the defendants stated to the plaintiff that the interior finish of the house would be just like the one she was then occupying, and further permitted the plaintiff to testify, over defendants' objections, that it was not like it, but was inferior in every respect. This was reversible error. All the preceding conversations were merged in the written contract, and their recital to the jury should have been prohibited by the court. Moreover, if this provision had been incorporated in the contract, it would have been error to permit the proof that there was a compliance in no respect whatever in view of the bill of particulars which alleged a departure from the contract in certain respects only, with reference to the interior finish. A bill of particulars is restrictive of the right of recovery stated in a declaration, and it is error to admit proof of a cause of action or damages not therein specified. Appellee concedes that proof was admitted as to damages for failure to build a partition wall, and for relathing the entire house, and that neither of the items are included in the bill of particulars. Furthermore, the court permitted proof of the cost of rebuilding the entire foundation walls upon the four sides of the building, and including the redigging of trenches already dug, while the bill of particulars only mention damages to the wall of the northeast corner of the building. All of this testimony was objected to by appellants. Its admission was error. The aggregate of these improper elements of damages, as estimated by appellee's witnesses, exceed \$200, and must have been allowed by the jury, as there is no other way of explaining even an approximate of the amount of the verdict. Proof of damages, barring the items in the plea of set-off, as to which no bill of particulars was requested or filed, should have been limited to the elements set out in the bill of particulars.

The plaintiff's second given instruction is as follows:

"The court further instructs the jury that although you

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may believe from the evidence that the plaintiff accepted the work in question and agreed to pay the balance, if any, yet if said work was not performed in a good and workmanlike manner and substantially in accordance with the contract, plans and specifications, either as to workmanship or material, and this fact was unknown to plaintiff, then it is your duty to find in favor of the plaintiff, notwithstanding the fact, if it be a fact, that the said plaintiff may have accepted the work in question."

It entirely ignores the plea and defense of set-off interposed by the defendant. The principal item included in this plea is the value of a porch. While it is contended that the porch was not finished, and should have had more substantial foundations, yet there is no serious question, under the proof, but that it was worth the amount charged for it, in its incompleated condition. There was evidence in the record tending to show that the amount of damages specified in the bill of particulars was less than the amount which the evidence tended to show the defendants were entitled to under their plea of set-off. If the jury had been permitted to consider this defense they might, under the state of the proof, have found a verdict for the defendants. It was the exclusive province of the jury to determine all issues of fact. This instruction, in effect, told the jury either to disregard the defense of set-off, or that if the defendants had failed to comply with their contract, and the plaintiff had sustained damages, that such damages exceeded the defendant's claim under their plea, and that they should therefore return a verdict for the plaintiff. In either case, the court invaded the province of the jury. The instruction should have been refused. Giving it was reversible error.

The verdict was excessive. The plaintiff's recovery should be limited to such an amount, if any, as is necessary to make the workmanship and materials for the items specified in the bill of particulars, equal in quality to that called for by the contract between the parties, less deduction, if any, to which the defendants are entitled under their plea of set-off. The highest estimate of damages under the

proofs is \$720, which includes not only the costs of labor and material at their fair cash market value, but ten per cent added for profit and from ten to twenty per cent for alleged superintendent's fees. Eliminating these items of ten, and ten or twenty per cent respectively, which are in excess of necessary expenditures, and those items heretofore considered as not included in the bill of particulars, the evidence, in the most favorable view to the plaintiff, would not justify a verdict for one-half of the amount of the judgment in this case.

While it was not reversible error to refuse to instruct the jury that on the state of the record the plaintiff could not recover for loss of rent, such instruction could not have injured the plaintiff, and would have been a safeguard to the defendant's rights. We think it should have been given.

For the errors indicated the judgment of the Circuit Court will be reversed and the cause remanded.

Galesburg Sanitarium v. John Jacobson.

1. **DAMAGES**—*One Hundred Dollars Not Excessive.*—Where plaintiff, a patient in a private sanitarium, paying for the services he received, did not receive reasonably kind treatment so far as the nature of his malady would allow, being assaulted more than was necessary to control him at times when he was insane or delirious, \$100 damages is not excessive.

Action on the Case. for personal injuries. Appeal from the Circuit Court of Knox County; the Hon. GEORGE W. THOMPSON, Judge presiding. Heard in this court at the April term, 1902. Affirmed. Opinion filed July 18, 1902.

SHUMWAY & RICE, attorneys for appellant.

EDWARD J. KING, attorney for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

Appellant is a corporation which conducts a hospital. Appellee was a patient therein for some two months. He alleges he was assaulted, beaten, mistreated and injured by

the servants and employes of appellant, and brought this suit to recover damages therefor. To an appropriate declaration appellant pleaded not guilty. Appellee recovered a verdict and a judgment for \$100 from which the sanitarium prosecutes this appeal.

Appellee was a section hand, and became violently insane at his boarding house, and was removed to the county jail by officers, after a struggle with him. He was afterward removed to the hospital. At first he was violent, and it is probable harsh measures were required to repress him, but he soon became much better, so that he was allowed to be at large, around the hospital, and was taken out for walks. He testified to numerous and serious acts of mistreatment, most of them inflicted by an attendant named Thorsen. As to his complaints of mistreatment when he was first taken to the hospital the preponderance of the proof by the officers and attendants was against appellee, and warranted the conclusion no more force was used than was necessary. But appellee's testimony as to the later impositions by Thorsen was not contradicted, Thorsen not being a witness. Moreover, as to some of them appellee was corroborated. Blakemore, a court reporter, testified he was at the hospital on one occasion, taking massage treatment. Thorsen got up a boxing match between appellee and a traveling man who was present. Neither of them wished to box, but Thorsen urged it. In the language of Blakemore, Thorsen was "egging them on." Appellee got the better of his opponent. Thorsen, to stop the contest he had inaugurated, hit appellee "a pretty good clip back of the ear," and knocked him down upon the lounge. Blakemore testified that upon another occasion appellee did not start quick enough to take a bath which Thorsen wanted him to take, and Thorsen slapped appellee on the side of the head. Appellee testified that on another occasion Thorsen hit him with a leather belt which had a buckle on the end, and made a dent in his side. He is corroborated by a physician who examined him at the hospital and found an abrasion on his side to which he directed medicine to be applied to heal it. Appellee testified another attendant, Stambaugh,

struck him in the mouth when he had on a pair of boxing gloves, and knocked three of his teeth loose, and that he went to Dr. Olson to have them fixed. Stambaugh denied this. A physician testified he found one of appellee's teeth loose, and Dr. Olson, a dentist, testified he found three of appellee's teeth loose and the alveolar plate broken. Omitting all testimony given by appellee of abusive treatment, wherein he is not corroborated, we are of opinion that the testimony he gave in which he was corroborated warranted the verdict. Appellee was ill and was a patient residing at the hospital for treatment, and was paying for the services he received, and he was entitled to reasonably kind treatment, so far as the nature of his malady would allow. No assault upon him was justifiable except so far as it was necessary to control him at times when he was insane or delirious. Appellant's servants on the occasions above referred to unnecessarily abused plaintiff, and inflicted upon him injuries for which the jury were warranted in holding their master responsible. There is no claim this was a charitable institution, nor any question as to its liability for the negligence of its employes on that account. The fact the jury awarded but \$100 as damages indicates they were not governed by passion or prejudice. The judgment is affirmed.

R. G. Mathews, Sheriff, v. W. W. Kimball Co.

1. *PRACTICE—Recitals in Orders Entered by Clerk Are Extra Judicial.*—It is immaterial that the recitals in orders entered by the clerk may show exception to the judgment, and the submission and rulings thereon of propositions of law under the 42d section of the practice act. These are matters that can only become a part of the record by being incorporated in the bill of exceptions and the clerk's recitals in that respect are, therefore, extra official and of no legal effect.

Replevin.—Appeal from the Circuit Court of Knox County; the Hon. GEORGE W. THOMPSON, Judge presiding. Heard in this court at the April term, 1902. Affirmed. Opinion filed July 18, 1902.

SHUMWAY & RICE, attorneys for appellant.

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R. C. HUNT, attorney for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This was a suit brought by appellee to recover possession of a piano, from appellant, the sheriff of Knox county, who claimed to hold it under an execution issued from the County Court of said county.

In the Circuit Court to which the case was taken by appeal from a justice of the peace, there was a trial by the court without the intervention of a jury, which resulted in favor of appellee. No propositions of law were submitted to the court below, no exception to the finding or judgment of the court was preserved in the bill of exceptions and there was no dispute as to the facts.

It is true that the clerk has included in the record what purports to be an exception to the judgment but this is not sufficient.

In *Gould v. Howe*, 127 Ill. 251, where numerous cases are cited in support of the proposition, it is said:

"It is immaterial that the recitals in the orders entered by the clerk may show exception to the judgment, and the submission and rulings thereon of propositions of law under the 42d section of the practice act. These are matters that can only become a part of the record by being incorporated in the bill of exceptions, and the clerk's recitals in that respect are, therefore, extra official, and of no legal effect." See also *Aden v. Road* Dist. No. 3, 197 Ill. 220.

There is therefore no question presented for the determination of this court and the judgment of the court below is accordingly affirmed.

**Second Borrowers and Investors Building Ass'n v.
William M. Cochrane, Assignee, et al.**

1. EVIDENCE—*Entries in Books of Account*.—The entries made by a party in books of account kept by him or under his supervision, are competent as admissions.

2. SAME.—*Admissions Against Interest*.—It is always competent to

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prove admissions of a party in interest to his prejudice, where they relate to a matter material to an issue being tried, and that without previously examining him in relation to such admissions.

3. *SAME—Entries in Official's Books.*—The entries made by an official in the books of account kept by him as a part of his official duties are competent evidence against him of the receipt of the funds therestated.

4. *INSOLVENCY—Position of Assignee.*—The assignee simply stands in the shoes of the insolvent; he possesses no superior rights. An assignee succeeds to all the rights and obligations of the assignor; what the assignor was obliged to pay can not be denied by him; he acquires no exemption from the obligation of the assignor which the latter did not possess at the time of the assignment. The mere act of assignment does not relieve the assignor from the duty of paying his debts and liabilities, and no more is the assignee relieved thereby.

Appeal from an Order Disallowing Claims Against Insolvent Estate.—Appeal from the County Court of Will County; the Hon. A. O. MARSHALL, Judge presiding. Heard in this court at the April term, 1902. Reversed and remanded. Opinion filed July 18, 1902.

HILL, HAVEN & HILL, attorneys for appellant.

DANIEL F. HIGGINS and COWING & YOUNG, attorneys for appellees.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

This is an appeal prosecuted from an order and decree of the County Court of Will County, entered February 13, 1902, dismissing and disallowing the claim of Second Borrowers and Investors Building Association, filed against the estate of Harry F. Cagwin, an insolvent. Cagwin for many years was the secretary of appellant, Second Borrowers and Investors Building Association, of Joliet, Illinois.

On January 10, 1898, a custodian was appointed for that association by the state auditor, and on the same day Cagwin executed and filed, pursuant to the insolvent laws of this State, his deed of assignment of all his property and estate to appellee, William M. Cochrane, who thereafter qualified and entered upon the discharge of his duties as such assignee. Notice was duly published for the filing of claims, and thereafter, and on May 7, 1898, said assignee

filed in said County Court his report of claims filed with him pursuant to said notice and within the time there limited and provided by law. Said report showed, among other claims filed, that of appellant in the sum of \$10,816.51, the amount alleged to be due said association from said Harry F. Cagwin, as ex-secretary thereof; and those of Bertha A. Camp, for \$252.04, Carrie M. Mack for \$187.20, and William M. Cochrane, trustee, for \$3,799.35.

After the filing of said report, Bertha A. Camp, Carrie M. Mack and William M. Cochrane, trustee, filed exceptions to said claim and gave bond for costs as provided by law. Thereafter at the February term, 1902, the claim of appellant and the exceptions thereto were heard by the court. Proofs were offered in support of the claim, and at their close a motion was entered by the objecting creditors and said assignee to exclude all books and documentary evidence offered by appellant, which had been received subject to objection, and to dismiss the claim. The court sustained both motions, and, as before stated, entered an order dismissing the claim. To reverse that order this appeal is prosecuted. The Second Borrowers and Investors Building Association was organized under the general laws of the State of Illinois. It was first organized at Peoria, Illinois, as the Borrowers and Investors Building Association, of Peoria, Illinois, and afterward transferred to Joliet, Illinois, where the name was changed to Second Borrowers and Investors Building Association of Joliet, Illinois. Soon after or at the time of its removal to Joliet, and on April 8, 1892, Cagwin was elected secretary, and was re-elected as such year by year, and continued to act as such up to January 10, 1898, when, as before stated, Daniel F. Higgins was appointed custodian. Thereafter, and on February 14, 1898, the stockholders of said association decided to go into voluntary liquidation in the manner provided by law, and duly appointed William C. Barber as liquidator, to wind up the affairs of the association, giving him full and ample authority for that purpose. After the organization of appellant, by-laws were duly adopted by it. Sec-

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tion 2, article III of said by-laws, prescribes the duties of the secretary as follows :

“ The secretary shall keep correct minutes of all meetings of the board of directors and of the association; receive all moneys paid to the association; keep a faithful account thereof with each stockholder, and pay all moneys received to the treasurer; report the condition of the treasury at each stated meeting of the board; render a full and detailed statement of the operations of the association at each annual meeting of the association, and perform all other duties incident to the office.”

The affairs of the association appear to have been practically run by Cagwin as secretary. He received and collected all moneys due and owing to the association, but instead of turning such money and funds over to the treasurer of the association, as provided by the by-laws, retained them in his own hands, paying them out on such claims or orders as might be drawn against them by himself and the president. The treasurer, Mr. William G. Wilcox, never received or handled a single dollar of the funds of the association, and was practically ignored in the affairs of the association, except on one occasion, when his signature to a report was desired.

Cagwin was sole proprietor of the Joliet City Bank, and as such had been conducting a general banking business in the city of Joliet for some seven or eight years prior to January 10, 1898. Its place of business was at No. 122 Jefferson street, Joliet. The office of the association was at the same place. The funds of the association were deposited by the secretary with himself as banker, under the name of the Joliet City Bank. Books of account were kept by Cagwin as secretary of the association and as banker. There is no question but that said books are mechanically correct and all charges entered in the books of original entry truly and accurately posted to the proper accounts in journal and ledger. The account in the ledger of the association showing the receipts and disbursements of Mr. Cagwin as secretary is designated “ Treasurer’s account.” On the bank books the same items show in the

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"Second B. & I. Secy." account. These two accounts are substantially the same, with the exception that the items which appear on the debit and credit sides, respectively, of the account in the so-called "Treasurer's account," on the books of the association appear on the credit and debit side, respectively, of the account on the books of the Joliet City Bank. On January 10, 1898, the "Treasurer's account" showed a debit balance of \$10,816.51, and on the same date the "Second B. & I. Secy." account showed a credit balance of \$10,870.40. The claim of appellant, filed by Mr. Barber as liquidator thereof, is for the amount shown by the books of the association, \$10,816.51.

Appellant, for the purpose of establishing its claim in the court below, offered the above accounts in the books of the association and bank, after showing that the various entries therein were all in either the handwriting of Cagwin himself or his clerks and employes working under his direction and supervision, and made in the course of the ordinary business of the association and bank. Appellant also offered various quarterly and annual statements of the affairs of the association, made pursuant to law and the by-laws of the association as spread of record on the journal of the association, and also as returned under oath by Cagwin as secretary to the state auditor, showing in his hands at various times the amount of funds specified in said treasurer's account. This class of testimony was all offered as admissions made by Cagwin against his interest and in the discharge of the duties imposed upon him by the by-laws of the association, and binding on him and those claiming under him. Objection was made to this class of proof on the ground that before it could be offered as against the objecting creditors, Mrs. Mack, Mrs. Camp and William M. Cochrane, trustee, proof must be made that the various entries were just and true; in other words, that it was incumbent on appellant to show by proof other than that furnished by the books themselves, that each item of cash shown on the "cash received" book of the association was actually received by Cagwin and actually depos-

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ited in the bank. The court adopted the contention of the objecting creditors, and as before stated, at the close of claimant's case, ruled out all this class of evidence, and thereupon dismissed the claim as not established by competent proof.

The first and main question raised in this court under the errors assigned, is whether these books of account and other documentary evidence offered by appellant was competent evidence, and sufficient to establish a *prima facie* liability against Cagwin and his estate and for the balance in his hands as such ex-secretary, as shown by these books, when taken in connection with the other testimony in the case.

We think the evidence excluded was competent and admissible and sufficient to create a *prima facie* liability against Cagwin.

The evidence was excluded upon the theory that it was necessary to prove that the entries in the books and the statements in the various documents were in fact true, or in other words, that it was necessary to render them admissible to make the same kind and degree of proof that the statute requires as a foundation for the admission of books of account.

This was error. As against Cagwin the books and documents were admissible as admissions against interest.

The entries made by a party in books of account kept by him or under his supervision, are competent as admissions. *Bartlett v. Board of Education*, 59 Ill. 369; *Alling v. Wenzell*, 27 Ill. App. 516.

It is always competent to prove admissions of a party in interest to his prejudice, where it relates to a matter material to an issue being tried, and that without previously examining him in relation to such admissions. 1 *Greenleaf on Evidence*, Sec. 191; *Brown v. Calumet River Ry. Co.*, 125 Ill. 600; *C. & N. W. R. R. Co. v. Boone Co.*, 44 Ill. 240; *Robbins v. Butler*, 24 Ill. 387; *Jones on Law of Evidence*, Sec. 272.

The accounts of the association and sworn reports of Cagwin were official acts performed by him and showed

the amount of money received by him belonging to the association. The entries made by an official in the books of account kept by him as a part of his official duties are competent evidence against him of the receipt of the funds there stated. *City of Chicago v. Gage*, 95 Ill. 593; *Cawley v. People*, 95 Ill. 249; *Doll v. The People*, 145 Ill. 253.

If Cagwin is not entitled to have this evidence excluded neither is his assignee. The assignee simply stands in the shoes of the insolvent. He possesses no superior rights. An assignee succeeds to all the rights and obligations of the assignor. What the assignor was obliged to pay can not be denied by the assignee; he acquires no exemption from the obligation of the assignor which the latter did not possess at the time of the assignment. The mere act of assignment does not relieve the assignor from the duty of paying his debts and liabilities, and no more is the assignee relieved thereby. The assignment act merely provides a means for the equitable and *pro rata* distribution of the assets of the insolvent among his creditors without favor or preference. *Parker v. Hull, Assignee*, 46 Ill. App. 471.

The remaining question is, were the accounts and documents admissible against the objections of the contesting creditors.

These creditors are not parties litigant to this proceeding. The statute simply permits them under certain conditions to appear as aids to the assignee to defend against what they may deem unjust claims. Their relation may be likened to that of an *amicus curiæ*. The fact remains that this is a lawsuit in which the Second Borrowers and Investors Building Association is appellant and William M. Cochrane, assignee of the estate of Harry F. Cagwin, an insolvent, is appellee. The objecting creditors are not parties to the record. Their relations to and interest in the litigation in no wise change the rules of evidence. We hold that the books of account and other documents were admissible over the objection of both the assignee and the contesting creditors, and for the error of sustaining such objections the judgment of the County Court must be reversed and the cause remanded.

**Commissioners of Highways of the Town of Freeport,
v. A. P. Goddard et al.**

1. **EQUITY PRACTICE**—*Affidavits to Support Unsworn Answer*.—Section 17 of our statute relative to injunctions permits the complainant to support his bill and the defendant to support his answer by affidavits filed with the same, which may be read in evidence upon the hearing of the motion to dissolve. Such provision is not confined to cases where the answer is under oath.

Bill for an Injunction.—Appeal from the Circuit Court of Stephenson County; the Hon. JAMES SHAW, Judge presiding. Heard in this court at the April term, 1903. Order dissolving injunction affirmed; decree dismissing bill reversed and cause remanded. Opinion filed July 18, 1903.

PATTISON & MITCHELL, attorneys for appellants.

OSCAR E. HEARD, attorney for appellees.

MR. JUSTICE DIBELL delivered the opinion of the court.

Appellants, highway commissioners of the town of Freeport, filed a bill against appellees, operators of a street railway, asking for an injunction to restrain appellees from re-laying their street car lines with a T-rail over a new bridge, 210 feet long. A temporary injunction was granted. The bill was answered. Afterward an amended bill and an amended answer were filed, and a motion was made to dissolve the temporary injunction, for want of equity on the face of the bill; for want of equity appearing from the bill, answer and affidavits, and because the writ was improvidently issued. The motion to dissolve the temporary injunction was set down for hearing, and was heard upon the bill and answer, and affidavits filed with the bill and answer respectively. The court below not only dissolved the temporary injunction, but also dismissed the bill. This is an appeal from that decree.

It is argued that as the bill waived an answer under oath and the answer was not under oath, the affidavits filed with the answer should have been stricken from the files, and

they should not have been considered on the hearing of the motion to dissolve. Section 17 of our statute relative to injunctions permits the complainant to support his bill and the defendant to support his answer by affidavits filed with the same, which may be read in evidence upon the hearing of the motion to dissolve. That provision is not there confined to cases where the answer is under oath. *Andrews v. Board of Supervisors*, 70 Ill. 65, seems to support the course pursued by the court below in allowing affidavits with an unsworn answer.

The cause had not been set down for final hearing, and the court was not warranted in dismissing the bill unless the bill was without equity on its face, for the bill prayed for a perpetual as well as for a temporary injunction. The bill averred the construction of the street railway with the T-rail over an old bridge at the point in question, when it was within the city limits of the city of Freeport, which is a part of the town of Freeport; that afterward the territory where the said bridge stood was disconnected from said city, and jurisdiction over said bridge devolved upon the highway commissioners; that the bridge was old and required replacing, and the highway commissioners removed the old bridge, built a new bridge, and paved it in a certain manner; that a T-rail is unsafe for vehicles and for the traveling public when laid with that kind of a pavement, and that the highway commissioners so determined, and adopted an order or resolution directing the operators of the street railway in relaying their track upon said new bridge to lay a girder rail, and gave notice thereof to said operators; but that they, disregarding such direction, were about to lay the T-rail across the bridge. The bill set out in detail, reasons why a T-rail would impair the usefulness of the bridge and would inflict injury upon the general public using said bridge, which it was averred was the principal bridge over which traffic in that vicinity passed. It is true, as appellees suggest, that under the horse and dummy act of 1874, and also under the enlarged statute of a like nature, passed in 1897, the authority to lay a street

railway in a public highway outside of a municipality is to be derived from the county board. Nevertheless, we are of opinion that the authority of the highway commissioners over the place in the highway where such track is to be laid is not thereby abrogated. The statute gives highway commissioners charge of the roads and bridges of their respective towns, and requires them to exercise such care and superintendence over the roads and bridges as the public good may require. We are of opinion that if the T-rail is unfit for use upon such a bridge and dangerous to the public using such bridge, and if, as the bill alleges, the way in which T-rails are laid in paved streets, makes it difficult and dangerous to pass over them with carriages and vehicles, and if the use of a T-rail would allow rain and moisture to get into the pavement and destroy it, when some other form of rail would obviate these difficulties, then, according to the case stated by the bill, the highway commissioners were within the proper exercise of their power and authority in requiring that a T-rail should not be laid over this 210 feet of bridge, regardless of the question whether they also had a right to prescribe that a particular form of rail known as the girder rail should be used in its place. The bill, therefore, should not have been dismissed for want of equity on its face.

The answer set up two ordinances of the city of Freeport under which defendants were operating the street railway in question, which ordinances prescribed the use of a T-rail; and it is claimed that they were contracts with the city of Freeport to permit the use of the T-rail upon streets and bridges, which could not be abrogated by the city or by any successor of the city in control of such bridges. The answer also denied that the territory where the bridge was had been disconnected from the city of Freeport, and that said bridge was under the care of the highway commissioners, although it admitted the highway commissioners had taken down the old bridge and built a new one. Defendants admitted receiving the notice given them by the highway commissioners, but denied that the

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highway commissioners had jurisdiction to act in the matter. They denied that the T-rail was unsuited for the use of the public upon such bridge. The ordinances were set out as exhibits to the answer, and they contain a provision for a T-rail. They also contain the following:

“The city reserves to the city of Freeport the right to control the use, improvement and repair of said streets, and each and every one of them, and each part thereof, to the same extent as if no grant of the right to use the same had been given to said company.”

The horse and dummy act, upon which appellees rely, also contains the following:

“Every grant to any such company of a right to use any * * * highway * * * shall be subject to the right of the proper authorities to control the use, improvement and repair of such * * * highway * * * to the same extent as if no such grant had been made, and to make all necessary police regulations concerning the management and operation of such railroad, whether such right is reserved in the grant or not.”

We therefore hold that the ordinances adopted by the city of Freeport do not debar the proper public authorities having control of said bridge from exercising all reasonable control over the manner in which the tracks of said street railway shall be laid over the bridge in question. The bill, under oath, averred that this control had passed to the highway commissioners by a disconnection of the territory. While the answer denied such disconnection, it was not under oath, and did not constitute proof, and no affidavit filed by defendants showed that said territory had not been disconnected. Therefore, so far as appears on the face of this record the highway commissioners were in control of this bridge, and had the right to exercise such reasonable control as was vested by the ordinance and by the statute in the proper authorities having control of the highway.

In view of the allegations of the answer we deem it proper to say that while, upon the hearing, complainants must prove the disconnection of this territory from the

city, yet if the proper steps were taken, and a proper ordinance disconnecting the territory was passed, and if the city then relinquished and the highway commissioners then assumed control over said territory, and the highway commissioners then removed the old bridge, and rebuilt this bridge, and the city is not claiming any authority over said bridge—in other words, if a disconnection in fact and exercise of authority by the highway commissioners should be established, then defendants can not litigate in this proceeding the question whether this territory ought to have been disconnected from the city or whether it was so situated as to come within the meaning of the statute authorizing the disconnection of territory from a city. This is a collateral proceeding in which the court can not inquire into the validity of the disconnection, as might be done in an appropriate proceeding brought especially for that purpose.

We think it manifest the courts could not properly determine the vital question in this case, which is whether the T-rail, laid upon a bridge paved as this new bridge is, is dangerous to the life of the bridge and the safety of the public using the same, by the consideration of mere *ex parte* affidavits upon a motion to dissolve a temporary injunction; but that complainants were entitled to have that issue tried by the production of witnesses and their examination and cross-examination. We therefore hold the court should not have dismissed the bill, but should have retained it to a hearing on the merits.

We, however, conclude it was proper to dissolve the temporary injunction and to permit the track to be temporarily laid while the suit was pending. The main part of the city and of the street car line was west of the bridge, but there was a railroad station east of the bridge, and there were factories east of the bridge, and a place of public resort to which defendants had contracted to run their street cars; and there were numerous residences and nearly a mile of street car track east of the bridge. It sufficiently appears that it was a matter of public necessity that

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defendants be permitted to run their street cars over this bridge while this litigation is pending. It was therefore proper to permit the rails to be temporarily laid to accommodate the public needs. The dissolution of the temporary injunction did not deprive the court of the power, under the prayer of the bill for a perpetual injunction and for general relief, to require the defendants to remove their T-rail and substitute some other and safer rail, if, on the final hearing, it should appear that the highway commissioners had the authority and that their order forbidding the use of the T-rail was a proper and reasonable exercise of their authority.

The order dissolving the temporary injunction is therefore affirmed, and the decree dismissing the bill is reversed, and the cause is remanded for further proceedings in conformity with this opinion.

Charlotte B. Hill v. The Coal Valley Mining Co.

1. **PRACTICE—Action for Use and Occupation.**—The action for use and occupation is founded upon a contract, express or implied, and the relation of landlord and tenant must exist between the parties.

2. **ADVERSE POSSESSION—May be Shown by Inference.**—Adverse possession may be shown by inference. A strong circumstance from which such possession may be inferred is the making of permanent improvements, such as the erection of division fences, the planting of orchards, or the erection of substantial buildings on the premises in controversy.

3. **SAME—Holder Not Liable to Owner for Rent.**—The rule that one becomes liable who continues to occupy premises after being notified by the owner that he will be required to pay rent, does not apply where the possession is adverse or hostile to the owner.

4. **ASSUMPSIT—Trial of Title to Land.**—Title to real estate can not be tried in an action of assumpsit.

5. **LANDLORD AND TENANT—When Relation Does Not Exist.**—Negotiations between parties looking to the recognition of the relation of landlord and tenant, and to the payment of rent, past or future, where the terms were not agreed upon, do not create such a relation.

Assumpsit, for the use and occupation of lands. Appeal from the Circuit Court of Mercer County; the Hon. WILLIAM H. GEST, Judge

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presiding. Heard in this court at the April term, 1902. Affirmed. Opinion filed July 18, 1902.

CONNELL & THOMASON, attorneys for appellant.

BROCK & SCOTT, attorneys for appellee.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

This is an action of assumpsit to recover rent for the use and occupation of certain lands and buildings thereon, situated in Richland, Grove township, Mercer county, Illinois. At the close of the plaintiff's case, the court on motion of the defendant directed the jury to find the issues for the defendant, and entered judgment against the plaintiff for costs. The plaintiff appeals.

The land in question, together with adjacent premises, has been the subject of litigation for years, between Thomas B. Ellis, P. L. Cable and others. A final decree was entered in the case directing a sale of the premises. Ellis became the purchaser and assigned his certificate of purchase to the plaintiff, to whom a deed was issued on September 10, 1888, and recorded two days later.

The premises conveyed by said deed were in section 16 of said township. Adjacent thereto and south therefrom, in section 21 of the same township, were lands owned by H. B. Sudlow, who erected a house, barn and other buildings thereon, long prior to the time that the deed above mentioned was issued to the plaintiff. Sudlow was continuously in the actual occupancy of the premises upon which he erected the buildings, together with other contiguous lands in section 21, until some time in 1891, when possession passed to Robert Lee, who used and occupied the buildings and grounds until the spring of 1893, when the title and possession passed to the defendant. The premises have been in the possession of tenants of the defendant from that time to the commencement of this suit.

The land for which rent is claimed by the plaintiff is about one-sixth of an acre, upon which a portion of the house erected by Sudlow is situated. The residue of the

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house is conceded to be situated upon the premises of the defendant. Sudlow, Lee and the defendant, respectively, have had possession of this strip of land ever since the erection of the buildings and prior thereto, exercising the usual acts of ownership, including the erection of division fences. Against their acts and possession no adverse claim was ever asserted until some time in 1891, when the plaintiff claimed to be the owner.

The question is, what is the true division line between sections sixteen and twenty-one? The plaintiff claims it is at a point which would leave the disputed strip on section sixteen, while the defendant claims the location of the true division line would leave the disputed strip on section twenty one. Years prior to the assertion of the plaintiff's claim a survey had been made and was known as the Stoddard survey. Assuming this survey to be correct, the plaintiff's claim of ownership would be defeated. In 1891, at the instance of the plaintiff, William B. Frew, county surveyor of Mercer county, also made a survey to locate the disputed line. The result of this survey tended to confirm the contention of the plaintiff as to the location of the division line.

The plaintiff bases her right to recover on the following provisions of the landlord and tenant act:

"The owner of lands, his executors or administrators, may sue for and recover rent therefor, or a fair and reasonable satisfaction for the use and occupation thereof, by action of debt or assumpsit, in any court of competent jurisdiction, in any of the following cases. * * * When lands are held and occupied by any person without any special agreement for rent." (Ch. 80, R. S.)

The foregoing provisions of the statute have been in force without any material variation since 1845. The act of February 20, 1861, in no wise changed the provisions of the statute under which this suit is brought.

The action for use and occupation is founded upon a contract, express or implied, and the relation of landlord and tenant must exist between the parties. *Dudding v. Hill*, 15 Ill. 61; *McNair v. Schwartz*, 16 Ill. 24; *Marr v. Ray*, 151

Ill. 340. In this case no such relation is shown to exist. The evidence shows that the defendant and those from whom it took conveyance and possession held under claim of ownership, and asserted that claim constantly by their mode of using and occupying the premises. They continuously occupied or rented the premises. Using and controlling real estate as owner is the ordinary mode of asserting claim of title. *Shaw v. Smithes*, 167 Ill. 269. Adverse possession may be shown by inference. A strong circumstance from which such possession may be inferred is the making of permanent improvements such as the erection of division fences, the planting of orchards or the erection of substantial buildings on the premises in controversy. Nor are oral declarations of hostile possession indispensable. *Grim v. Murphy*, 110 Ill. 271; *O'Flaherty v. Mann*, 196 Ill. 304. We hold that the possession of the defendant was adverse to the alleged rights of the plaintiff and that none of the essentials of the relation of landlord and tenant are established by the evidence.

By this proceeding the plaintiff is attempting to establish a claim to land, the title to which is controverted. Title to real estate can not be tried in an action of assumpsit. *King v. Mason*, 42 Ill. 223.

But it is claimed that the plaintiff made demand upon the defendant for possession and served notice that it would be required to pay rent thereafter; and that there were several interviews between the agents of the parties in which the defendant agreed to pay rent if a reasonable amount could be agreed upon, and that therefore there was an implied promise to pay for the use and occupation of the premises from the date of such alleged promise. No agreement to pay rent was reached in any of these interviews. None of the propositions or counter propositions were ever accepted or acted upon by either party. Negotiations between parties looking to the recognition of the relation of landlord and tenant, and to the payment of rent, past or future, where the terms were not agreed upon, do not create such a relation. *Taylor's Landlord and Tenant*, 2d Ed.,

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Sec. 21; Lathrop v. Standard Oil Co., 9 S. E. Rep. 1041; Ballentine v. McDowell, 2 Scam. 28.

The rule that one becomes liable who continues to occupy premises, after being notified by the owner that he will be required to pay rent, does not apply where the possession is adverse or hostile to the owner. Fender v. Rogers, 97 Ill. App. 280.

Finding the record free from error the judgment of the Circuit Court will be affirmed.

Edwin Harris v. J. F. Humphrey & Co.

1. PRACTICE—*Dismissing Suit as to One of Two Joint Defendants.*—Where a declaration charged two defendants with joint liability, and after the proofs were in, and arguments heard, the suit was dismissed as to one defendant against the objection of the other defendant, *held*, that as the plaintiff, by reason of the objection made by the remaining defendant, was apprised of the defective condition of the declaration, he should have amended it, and having failed to do so, it was error for the court to enter judgment against the remaining defendant alone.

Assumpsit, for goods sold and delivered. Error to the County Court of Woodford County; the Hon. THOMAS KENNEDY, Judge presiding. Heard in this court at the April term, 1902. Reversed and remanded. Opinion filed July 18, 1902.

JAMES A. RIELY, attorney for plaintiff in error.

AGLE & HAWK and BARRY, MORRISSEY & FIFER, attorneys for defendants in error.

MR. JUSTICE HIGBEE delivered the opinion of the court.

J. F. Humphrey & Co., a corporation in the wholesale grocery business, sold to Mary Harris, wife of Edwin Harris, groceries for her retail store at Minonk, and charged the same to her account. On January 30, 1901, when all the items with which she was charged in the account were more than five years old, except the last one of \$3, Humphrey & Co. brought suit against her for the recovery of the several amounts claimed to be due them and interest, amounting in all to \$329.92. An officer of the corporation

filed with the declaration an affidavit of merits, showing that the demand was for goods and merchandise sold and delivered to her. The declaration which contained only the common counts, was afterward amended by making Mary and Edwin Harris defendants and a like affidavit of merits was filed stating that these parties owed the corporation for the goods. Edwin Harris filed a plea in abatement, and the declaration was again amended by making Mary and Edwin Harris defendants, another affidavit of merits being also filed. Pleas having been filed and issue joined, a jury was waived and there was a trial before the court.

When all the evidence was in and the arguments heard, plaintiff below asked leave to dismiss the suit as to Mary Harris. Defendant Edwin Harris objected, assigning as a reason that the suit was a joint action and judgment should go against both defendants or none of them, and that no declaration had been filed setting up a cause of action against him individually. The court, however, dismissed the suit as to Mary Harris and retained it as to Edwin Harris. Edwin Harris then asked an opportunity to offer some testimony relative to a conversation an officer of the corporation testified to having had with him, which tended to show that this was his individual debt. This was refused, the court saying "it is too late, the evidence has been closed." He then asked for a continuance and presented an affidavit stating that he was taken by surprise by the dismissal of the suit as to Mary Harris; that there was no declaration on file, charging him with a breach of any individual promise or a separate or individual liability; that he wished an opportunity to testify denying the conversation above referred to as alleged to have taken place between him and an officer of the corporation; that he could produce witnesses, whom he named and who resided in Minonk about twenty-five miles from the place of holding court, to show that Mary Harris was the owner and proprietor of the store at the time the goods in question were claimed to have been bought, and that affiant had no interest therein and that he had no reason to suppose that said witnesses would be necessary at the trial of the case.

The motion for a continuance was denied by the court, the issues found for the plaintiff against Edwin Harris and judgment rendered against him for \$317.48. He has brought the case here by writ of error, and insists that, as the declaration was a joint one against him and Mary Harris, judgment should not be rendered against him alone after the suit was dismissed as to her, without amendment.

In answer to this proposition defendant in error asserts that under a declaration charging joint liability, proof of a cause of action against only one defendant, after the other has been dismissed, without amending the declaration, is merely a variance which can not be availed of without an objection to the testimony on the ground of variance or a motion to exclude the evidence for that reason. To support this position defendant in error relies upon the case of *A. W. Stevens Co. v. Kehr*, 93 Ill. App. 510, where there was a declaration charging two with joint liability and the suit was dismissed as to one before the trial of the cause, judgment being rendered against the other. This court there held "the fact that the proof showed a cause of action against only the remaining defendant, while the allegation was of the joint liability of the two defendants, was merely a variance, and in order to avail thereof on appeal there should have been an objection to the testimony on the ground of variance, or a motion to exclude the evidence for that reason. (*Mayer v. Brensinger*, 180 Ill. 110.) No such objection or motion was interposed, nor was the point made in the court below, where plaintiff could have amended his declaration. We therefore conclude this variance does not entitle defendant to a reversal."

The same conditions, however, do not exist in this case. Here the dismissal of the case as to Mary Harris was not entered until after the proofs were all in and the arguments heard. When, however, the motion was made to dismiss the suit as to Mary Harris, plaintiff in error objected unless the suit was also dismissed as to Edwin Harris, for the reasons above given. By this objection and also by the affidavit for a continuance afterward filed, where the condition of the declaration is again referred to as a reason why the

suit should not be maintained, the attention of defendant in error was called to the fact that the declaration charged a joint liability. Under such circumstances defendant in error, having had ample notice of its defective condition, should have amended the declaration, and having failed to do so, it was error for the court to render a judgment under that declaration against Edwin Harris alone.

We are also of opinion that as the issues were completely changed by the dismissal of Mary Harris from the suit, the court should, after that took place, have permitted Edwin Harris to introduce proof as to his liability. The judgment of the court below will therefore be reversed and the cause remanded for another trial.

City of Rockford v. William Doughty.

1. PUBLIC IMPROVEMENTS—*Measure of Damages Caused by.*—It has often been held that the market value of the land before and after the improvement furnishes the true criterion for determining the damages to lands damaged but not taken for a public improvement.

Action on the Case, for damages caused by raising the grade of a street. Appeal from the Circuit Court of Winnebago County; the Hon. JOHN C. GARVER, Judge presiding. Heard in this court at the April term, 1902. Reversed and remanded. Opinion filed July 18, 1903.

C. O. CARBAUGH, city attorney, for appellant.

R. K. WELSH, attorney for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

Doughty owned a lot in Rockford upon which was a dwelling house. The city raised the grade of the street in front. Doughty claimed his lot was injured thereby, and brought this suit to recover the depreciation in value of the property alleged to have been caused by said improvement. He recovered a verdict and a judgment for \$495. The city appeals.

The court refused to permit defendant to prove the value of the lot immediately before and immediately after the

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making of the improvement, but compelled it to confine its proof on that subject to the single question whether the property was or was not depreciated in value by the improvement, and if it was depreciated, then how much was the depreciation, the court holding that the value immediately before and immediately after said improvement was a matter for cross-examination only. In *Springer v. City of Chicago*, 135 Ill. 552, a suit to recover for damages said to have been inflicted upon real estate by an improvement completed by the city in July or August, 1888, the court said :

“In order to determine whether the plaintiff had been damaged by the construction of the improvement, it was proper to show the value of the property before and after the improvement had been made. Evidence of what the property was worth in July and August, 1888, was therefore competent for the consideration of the jury.”

It has often been held that the market value of the land before and after the improvement furnishes the true criterion for determining the damages to lands damaged but not taken by a public improvement. *Metropolitan West Side E. R. Co. v. Stickney*, 150 Ill. 362; *Allmon v. C. P. & M. R. R. Co.*, 155 Ill. 17.

Appellee does not dispute this rule, but argues there is no difference between proving the value just before and just after the improvement and proving whether or not there was a depreciation in value caused by the improvement, and the amount of such depreciation, if any, and that as the witnesses to whom defendant put these questions to which the court sustained objections testified in answer to other questions that in their judgment the value of the premises was not reduced by the improvement, defendant got all the proof to which it was entitled and was not harmed by the ruling. We think this too narrow an estimate of the effect the proposed proof might properly have upon the case. Plaintiff had proved by witnesses that the property had been depreciated in value by the improvement, and such witnesses had given various opinions as to the amount of

such depreciation. Defendant in cross-examining said witnesses had inquired of them, as it had a right to do, their opinion of the market value of the premises just before and just after the improvement was made. We are of opinion that when defendant came to putting in its case it had a right to show the market value before and after the improvement in order to better enable the jury to determine whether the opinions testified to by plaintiff's witnesses as the amount of the depreciation, were reasonable or unreasonable. Plaintiff's witnesses placed the decrease in value at from \$400 to \$600, plaintiff being the only witness who placed it above \$500. If defendant had been able to show the property was worth but \$1,000 just before the improvement the jury might have reasonably concluded the property could not have depreciated in value \$400 to \$600 by the raise in the grade of the street in front; while if the property had been shown to be worth \$5,000 or \$10,000 before the improvement, such estimate of the amount of the depreciation might have met their approval. By refusing to permit defendant to go into the question of the market value of the premises just before and just after the improvement, the court deprived defendant of a very proper test to determine the value to be attached to the testimony given by the various witnesses, and reduced the inquiry to a mere matter of opinion upon the very question which the jury were to decide. We hold defendant was deprived of material proof to which it was entitled.

The judgment is therefore reversed and the cause remanded for a new trial.

Charles Phillips v. Jacob Dowhower.

1. **BROKERS**.—*When Entitled to Commissions*.—A broker is entitled to his commissions when he has furnished a buyer who is ready, willing and able to purchase.

Assumpsit.—Appeal from the Circuit Court of Livingston County; the Hon. GEORGE W. PATTON, Judge presiding. Heard in this court

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at the April term, 1902. Reversed and remanded. Opinion filed July 18, 1902.

W. C. GRAVES, attorney for appellant.

A. C. NORTON, attorney for appellee.

MR. JUSTICE HIGBER delivered the opinion of the court.

Appellant, a commission man in Pontiac, claims that on February 28, 1901, appellee placed in his hands a farm of 110 acres to be sold at \$96 per acre; that he was given three months in which to make a sale, and was to have a commission of one dollar an acre for his services in case he succeeded; that early in April, 1901, he took a purchaser, Charles Flaeger, to appellee, who was ready and able to buy the farm at the price named; that he said to appellee, "Mr. Dowhower, I have a buyer here; Mr. Flaeger is ready to take your farm at your price, \$96 an acre;" that Mr. Flaeger said "Yes, I will take the farm;" that appellee thereupon said, "I took that farm out of your hands; you can go to thunder; I am not going to sell my farm now;" that appellee further said he could attend to his own business; that he would not sell his farm and that they could not make him sell it. Phillips shortly afterward brought suit against Dowhower before a justice of the peace for the commission of one dollar an acre claimed by him and was defeated.

In the Circuit Court, where Phillips took the case by appeal, Dowhower, at the close of plaintiff's evidence, requested the court to withdraw the evidence and instruct the jury to find the issues for the defendant. The court granted the motion, gave the instruction asked, and the jury found for the defendant.

A motion for a new trial was overruled and judgment was entered against Phillips for costs, from which he appealed.

We are of opinion that the court below erred in directing a verdict in this case. Appellant's testimony, supported in certain respects by the testimony of the witnesses J. A. Blue, Charles Flaeger and Henry F. Flaeger, tended to

show that he was employed as a commission man by appellee; that he was to have a certain time in which to make a sale; that within the time limited he procured a purchaser who was both willing and able to buy the premises at the price named, and that appellee, without giving any sufficient reason, refused to complete the sale. No evidence was introduced to show a different state of facts or to contradict the testimony of the witnesses above named. Under such circumstances appellant had a right to have the cause submitted to the determination of a jury. The judgment is therefore reversed and the cause remanded for another trial.

The Alden Coal Company v. Thomas Challis.

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1. **INJUNCTIONS—When Bill Will Lie for Trespass.**—Where a trespass has already been committed, and the court can see that it is the purpose of the defendant to commit other deliberate trespasses, which can not be adequately compensated by a judgment at law, or where the damage of such trespass is merely nominal, then a bill for injunction lies; and where the defendant is insolvent, an additional ground of equitable jurisdiction is added by that fact.

2. **DEDICATION—Of Public Streets—What is.**—The acts of one who lays out lots fronting upon streets which connect with public highways, and rents them to inhabitants of the village, are a dedication of the streets to public use during the time the lots are so rented and occupied.

Bill for an Injunction.—Appeal from the Circuit Court of Mercer County; the Hon. FRANK D. RAMSAY, Judge presiding. Heard in this court at the April term, 1902. Affirmed. Opinion filed July 18, 1902.

BROOK & SCOTT, attorneys for appellant.

It is absolutely essential to a dedication by parol that there be an intent to dedicate. The intent to dedicate is a vital and indispensable element. *Chicago v. Drexel*, 141 Ill. 89; *Chicago v. C., R. I. & P. Ry. Co.*, 152 Ill. 561; *Waggeman v. North Peoria*, 155 Ill. 545; *Wheatfield v. Grundmann*, 164 Ill. 250; *Trustees v. Walsh*, 57 Ill. 363.

Where there is a question of dedication, the testimony of the owner as to his intention is admissible, and may be con-

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sidered in connection with all the facts. *Chicago v. C., R. I. & P. Ry. Co.*, 152 Ill. 561; *Chicago v. Ward*, 169 Ill. 392.

Under the law of Illinois, no estoppel arises by leaving a passageway open for travel, unless the owner sells lots with reference to a plat, showing such passageway to be a street. To create an estoppel the lots must be sold as abutting on such streets, and with clear reference to a plat of such lots and streets, which must have been exhibited to the purchaser. *Mason v. City of Chicago*, 163 Ill. 368, 369; *Wag-geman v. North Peoria*, 155 Ill. 545.

CONNELL & THOMASON, attorneys for appellee.

Although a plat has not been properly acknowledged, if the owner makes sales of lots with reference to streets, he and those claiming under him will be estopped from questioning the existence of such street. Such acts will create a common law dedication of the streets. *Earl v. City of Chicago*, 136 Ill. 277.

"Dedication of highways may be proven in various ways; as by grant, by user, or by acts and declarations of the owner."

"No particular length of time is necessary for evidence of dedication." *Marcy v. Taylor*, 19 Ill. 634.

"The evidence (to prove a dedication) may consist of any declaration or acts of the land owner, naturally indicative of such intention, or by his acquiescence in the public use under circumstances which would reasonably forbid such acquiescence if there was no such intention."

"The fencing out of a strip of land, suitable for a highway, and which is of little or no value, as fenced, for any other purpose, is evidence of an intention to dedicate it to that use." *O'Connell v. Bowman*, 45 Ill. App. 654.

"The placing of fences along the sides of a street, thus fencing out a strip sixty-six feet wide, is evidence of its being left for a street." *City of Chicago v. Hill*, 124 Ill. 646.

"It is not essential that the fee pass, nor that there is a grantee *in esse*, nor that there be a deed, nor any specific length of possession in order to constitute a valid dedication." *Dillon on Mun. Cor.*, Sec. 642; *Cincinnati v. White*, 6 Peters, 431.

"As against the proprietor a dedication may be complete without any act or acceptance on the part of the public." *Dillon on Mun. Cor.*, Sec. 642.

"If a man build a double row of houses opening into an ancient street at each end, making a street, and sells or lets the houses, that is instantly a highway." Herman on Estoppel, Vol. 2, Sec. 1142; Dillon on Mun. Cor., Sec. 638, note 1.

"If a party lays off land for public use and makes sales of lots in reference thereto, it amounts to a dedication."

"No plat is essential to a dedication." Field v. Carr, 59 Ill. 200.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

This is a bill in chancery brought by the Alden Coal Company, a corporation, to enjoin Thomas Challis from going upon premises claimed to be owned by the complainant.

The complainant owned land which is situated about four miles from Viola and about seven miles from Aledo, the county seat of Mercer county. The complainant operated a coal mine under the surface of said land, upon which it staked out and located a town site, though no plat thereof appears to have been made. It located various lots and streets, and leased the lots and houses thereon for various terms up to but not exceeding ten years, nor longer than the complainant should there be engaged in mining coal, while some of the leases were for a shorter period. The company sustained the relation of landlord to all of the occupants, but some of them owned their own houses situated upon leased ground. Practically the entire population were employes of the complainant engaged in various occupations in and about the operation of the coal mine.

In this manner a settlement or village of about five or six hundred inhabitants grew up and is known as New Gilchrist, but was not incorporated. It had a postoffice, church, school house, hotel, livery stable, barber shop, as well as a large general store which was owned by and conducted by the complainant. The store had a department in which meats were sold.

It was the intention of the complainant, after the coal was all mined out, to remove the buildings owned by it to some other locality.

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The general public had been accustomed to visit this village and travel upon its streets at pleasure and without objection by the complainant.

The defendant kept a meat market at Aledo, and traveled through the adjoining country peddling meats, and in doing so came to New Gilchrist. He established trade relations with the people of the village, came two or three times a week, and delivered from twenty to two hundred pounds of meat each trip, thereby reducing the sales the complainant had previously made to the extent of \$100 to \$125 per month.

The complainant repeatedly ordered him to remain out of the village, which he refused to do. Upon his persisting in peddling there, the complainant brought three suits for trespass against him. One of these suits has been dismissed and the others are still pending.

The complainant then filed this bill to enjoin the defendant from going to the village of New Gilchrist. There was a hearing upon bill, answer, replication, and proofs taken, which resulted in a decree dismissing the bill. The complainant appeals.

The theory of the bill is that the complainant owns the streets of the village, that they are not public streets but the private property of the complainant, and that the defendant is a trespasser in going upon them; that repeated trespasses have been committed, others threatened, and that the defendant being insolvent, the complainant is entitled to relief by injunction.

Where a trespass has already been committed, and the court can see that it is the purpose of the defendant to commit other deliberate trespasses, which can not be adequately compensated by a judgment at law, or where the damage of such trespass is merely nominal, then a bill for injunction lies; and where the defendant is insolvent, an additional ground of equitable jurisdiction is added by that fact. *Edwards v. Haeger*, 180 Ill. 99.

We hold that the bill was properly dismissed. The occupants of the various lots leased from the complainant, as

well as the general public, had a right to use the streets during the tenure of the leases. The acts of the complainant in laying out the lots fronting upon the streets which connected with public highways, and renting them to inhabitants of the village, was a dedication of the streets to public use during the time the lots were so leased and occupied.

The rights thereby created are not for the exclusive use of the tenants, but for the benefit of the public as well. *Earl v. City of Chicago*, 136 Ill. 277.

It follows that the defendant was justified in going upon the streets and selling meats to the inhabitants of the village, and that in so doing he was infringing upon no legal rights of the complainant.

It is urged by the defendant that the relief sought by the complainant is in restraint of trade, and should therefore be denied on grounds of public policy. In view of the fact that the alleged trespass would be but a nominal damage, as well as from facts appearing from the whole record, it is manifest that the sole object in filing the bill was to stifle competition with and to give the complainant a monopoly of the meat business of the village. The inhabitants are laboring men. They spend their hours in toil. They have no time to go to distant markets where competition is free and open, to buy the necessities of life. To deprive tradesmen of their legal right to come to the door of these people in fair competition with the complainant, would be deplorable indeed, and would give the latter an unconscionable advantage over their employees.

But this decree must be affirmed independent of the question now under consideration, and for the reasons first presented in this opinion. The decree of the Circuit Court will be affirmed.

Maggie Baxter v. Christian F. Thede.

1. **PRACTICE**—*When Former Judgment is a Bar.*—A judgment of a court having jurisdiction of the parties and the subject-matter is final, not only as to the matters actually litigated, but as to all controversies properly involved which might have been raised and determined.

Trespass, to real property. Appeal from the Circuit Court of Mercer County; the Hon. FRANK D. RAMSAY, Judge, presiding. Heard in this court at the April term, 1902. Affirmed. Opinion filed July 18, 1902.

CONNELL & THOMASON, attorneys for appellant.

McARTHUR & COOKE, attorneys for appellee.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

This case is before us a second time. The former proceedings are reported in *Baxter v. Thede*, 96 Ill. App. 499. The cause of action is for damages arising from the continuation of an alleged trespass to real estate. The alleged trespass consisted in appellee constructing a brick building upon his premises in the city of Aledo, Mercer county, so that a portion of the foundation projected a very short distance upon the adjoining premises of appellant. The trial of the original suit resulted in a judgment in favor of the plaintiff, who is the appellant here, of \$150. That judgment was unappealed from and paid.

A second trial of the second suit resulted in a verdict and judgment in favor of the defendant below, who is the appellee here.

The first question for our determination is whether the judgment for \$150 in the first suit is a bar to a recovery in this suit. While most of the testimony related only to damages resulting from the commission, not the continuation of the alleged trespass, nevertheless under the pleadings, proofs and instructions, permanent damages might have been recovered in that proceeding for a continuation of the trespass to the time of trial.

We hold that the former suit was a bar to the recovery

in the present case. A judgment of a court having jurisdiction of the parties and the subject-matter is final, not only as to the matters actually litigated, but as to all controversies properly involved which might have been raised and determined. *Allen v. Haley*, 169 Ill. 532.

But independent of this conclusion there is no merit to appellant's claim. The proofs show that prior to the conclusion of the trial of the former suit appellee removed what small projection of the wall was supposed to be upon her premises.

The evidence justified the conclusion of the jury and trial court, that from that time there had been no continuance of what was formerly supposed to be a trespass upon appellant's premises. The evidence warranted the further conclusion that by a re-survey of the premises with reference to well defined ancient landmarks, that at no time did the wall in question ever project over the line or upon the premises of appellant. Notwithstanding this fact, she had recovered a judgment for such supposed trespass.

In the trial of the former case the appellee filed a plea in which he admitted his wall, at two places at the bottom, extended upon the premises of the defendant to the extent of about three and three-fourths inches. He filed a further plea of tender of twenty-five dollars, which was deemed insufficient by the jury. It is now contended that the plea in the former case admitting the wall to be upon the premises of appellant to the extent therein stated estops appellee from showing to the contrary upon this trial. While that plea may have the effect to estop him in this case from showing that none of the wall originally projected upon appellant's premises, it does not deprive him of the right to show that he subsequently, and before the conclusion of the trial of the former case, removed all portions thereof which had previously extended upon the premises of the appellant, treating the line between their properties as it was then supposed to exist.

We hold that the judgment of the court below was proper and its rendition administered substantial justice to the

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parties. The record being free from error the judgment must be affirmed.

A motion was made by appellee to tax the costs of an additional abstract, which motion was taken with the case. We conclude that a portion only, of the additional abstract was necessary, and only one half the cost thereof will be taxed against the appellant.

John Yetter v. Sherman Van Patten.

1. INSTRUCTIONS—*Principal and Agent*.—In a suit by an agent against the other party to a settlement, an instruction which states that the burden is upon the other party to prove that the agent had not exceeded the powers given him by his principal, is erroneous. The agent can not, in the absence of fraud on the part of the other party, repudiate the settlement on the ground that his instructions did not authorize him to do that which he voluntarily did.

Assumpsit, for money paid by mistake. Appeal from the Circuit Court of Lee County; the Hon. JAMES SHAW, Judge presiding. Heard in this court at the April term, 1902. Reversed and remanded. Opinion filed July 18, 1902.

D. W. BAXTER and R. S. FARRAND, attorneys for appellant.

O'BRIEN & McHENRY and HENRY S. DIXON, attorneys for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This suit was brought by appellee against appellant to recover certain money claimed by the former to have been paid by him by mistake, while acting as agent of his father, to the latter. There were certain business matters between C. F. Van Patten, father of appellee, and appellant, which required to be settled, and it had been arranged between them to go to Rochelle, Illinois, to make a settlement. When the time came, C. F. Van Patten was unable to go on account of illness, and arranged to have appellee go in his place. Appellee and appellant went together to Rochelle

and a settlement was there made in which was included a note for \$425 signed by C. F. Van Patten and appellant, which appellant had paid some years before. The preponderance of the proof is that upon this note C. F. Van Patten was principal and appellant surety. There was another note for \$755, part of which had been paid by C. F. Van Patten, upon which he and appellant were sureties. This note was also settled at the same time and C. F. Van Patten allowed for the payment he had made. In the settlement each party bore one-half of each note. Appellee paid appellant \$88.14 as the balance due to him and appellant delivered to appellee the note for \$425.

Appellee claimed that he had no authority from his father to settle the \$425 note, which was barred by the statute of limitations; that after the settlement was made his father repudiated and refused to be bound by it; that he thereupon promised his father to pay him what had been allowed appellant on said note in the settlement and that since that time he has paid his father such amount, the larger portion of which has been paid since the commencement of this suit. The suit resulted in a verdict and judgment in favor of appellee for \$513.26, from which the defendant below appeals.

The court instructed the jury by three instructions given for appellee, that the burden was upon appellant to prove by a preponderance of the evidence that C. F. Van Patten had authorized his son in making the settlement to allow appellant for the \$425 note and this rule was also indirectly recognized by another instruction given for appellee. These instructions were erroneous and misleading.

We are of opinion that appellee did not make a cause of action by merely proving that his father had not authorized him to include the note in question in the settlement. He knew what authority his father had given him and appellant did not. If he voluntarily, and not by reason of representations made to him by appellant, exceeded his instructions and settled something his father had not authorized him to settle, that fact does not authorize the undoing of

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the settlement as between appellant and appellee. If C. F. Van Patten were suing here and appellant was setting up as a defense that he had made this settlement with the agent, then appellant might be bound to show the authority of the agent. But where the agent himself is bringing the suit to recover the money paid, he can not, in the absence of fraud on the part of the other party, repudiate the settlement on the ground that his instructions did not authorize him to do that which he voluntarily did. Appellee indeed claimed that he made the allowance in the settlement because appellant told him that his father had promised to pay a portion of this note in the fall about two or three months before. This, however, was denied by appellant, who says he produced the note and asked to have it included in the settlement, and that appellee said he knew about the note and that his father had told him to do what was right between man and man. By reason of the errors in the instructions above noted, the judgment must be reversed and the cause remanded.

The question whether suit could, in any event, be maintained in the name of appellee, is not presented by this record. Appellee assigns as cross-errors that the court erred in refusing instructions 10 and 11 asked by him. The refused instructions were to the effect that if appellant was a surety on the note in question and paid it before it became due, without the knowledge, consent or request of C. F. Van Patten, the principal, then the payment was a voluntary one and he could not recover anything from the principal by reason thereof. It appeared that appellant received a written notice from the bank to pay the \$425 note, which was a renewal note, and went to the bank and paid it the day before the note was due. The law will not require that a surety who pays a note for the principal, under circumstances similar to those above named, shall in all cases lose his right of action against the principal for the money paid. If C. F. Van Patten had a defense to the note or to any part thereof which he was prevented from interposing by reason of the surety paying it before due, no doubt that

defense could be interposed in a suit against him by the surety for the amount so paid, but no such case is claimed to exist here. On the contrary it appears that about two months after Yetter paid the note he told C. F. Van Patten he had done so, and it does not appear that Van Patten objected to or repudiated the payment or claimed to have been in any way harmed thereby. The instructions named in the cross-errors were therefore properly refused.

Reversed and remanded.

Leslie Robinson et al. v. Rhea-Thielens Implement Co.

1. *VERDICT—Upon Conflicting Evidence.*—Where the evidence is conflicting, the verdict will not be disturbed on the ground that the judgment was too small.

Assumpsit, upon the common counts. Appeal from the Circuit Court of Peoria County; the Hon. LESLIE D. PUTERBAUGH, Judge presiding. Heard in this court at the April term, 1902. Affirmed. Opinion filed July 18, 1902.

DAN F. RAUM, attorney for appellants.

ARTHUR KEITHLEY, attorney for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

On January 31, 1900, the parties to this suit, by written agreement, exchanged certain portions of adjoining lots they owned in Peoria, Illinois. In the agreement it was provided that appellee should build two brick walls upon one of the lots in question, to be completed by May 1, 1900, each to be not less than twelve inches thick. The first wall was to be three stories high, be laid six inches on either side of the line dividing the property, and when completed to be and continue a party wall, and upon its completion appellants were to pay appellee \$175 in cash. The second was to be parallel with the party wall and forty-six feet distant, and to be "two stories and fire wall

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in height." Appellee was to connect the joists, rafters, and walls and roofs with the building then on the premises, so as to completely inclose the building on the property conveyed to appellants, and appellants were to take down the wall then existing and such part of the building as might be necessary to construct the new walls. Appellants afterward concluded that they would not leave standing the building on their premises, but construct a new one instead. This made it necessary to make certain changes, and among others the thickness of the party wall was increased from twelve to sixteen inches. Appellee built the walls provided for, but the party wall was not completed within the time mentioned in the agreement. This suit was brought to recover the amount of \$175 mentioned in the contract, and also one-half the additional cost of constructing the wall sixteen inches, instead of twelve inches in thickness, which was claimed to amount to \$49.55.

Appellants filed the general issue and two pleas of set-off, claiming damages for loss of rent by reason of the fact that appellee did not complete the contract within the time specified and that appellee was relieved of performing a part of the contract in connecting the walls with the old building, as the latter was torn down by appellants. At the conclusion of all the proofs the court excluded the evidence in regard to the additional cost of building the sixteen-inch wall over that of building a twelve-inch wall, so that portion of appellee's claim was taken from the consideration of the jury. There was a verdict for appellee of \$136.20, but a remittitur was entered for \$16.20, and judgment was given for appellee for \$120.

Appellants contend that the verdict was contrary to the evidence and that the court erred in giving two instructions on behalf of appellee. After the contract was made appellants began to consider the erection of a new building in place of their old one. Appellee was going to build and encouraged appellants to rebuild. There were conferences between the parties concerning the matter, appellee desiring that in case appellants built they should erect their new

building to correspond in appearance with the one to be erected by appellee. Appellants obtained the plans for their new building April 4th, and let a contract for the building between that time and April 10th; work was commenced May 16th, and the party wall was completed up to the height of appellants' building about July 4th.

R. L. Rhea, president of appellee company, testified that appellee was ready to begin work at any time, if appellants had not caused delay on account of the new building; that the work would have been done on the first of May if appellee had not been delayed by appellants' being undecided on account of the new building; that appellee was prepared and had expected to do it.

Appellee therefore contended that there was a mutual understanding between the parties that the work would not be undertaken until the plans for the new building were matured and that in consequence thereof appellee was excused from finishing the party wall by May 1st. In accordance with this theory appellee offered the two instructions complained of, which the court gave. By these instructions the jury were told that if they found from the evidence that appellee was prevented from completing the work within the time limited by reason of the acts of the appellants, and afterward completed the same within a reasonable time, or if the parties mutually agreed that appellee should not build the walls mentioned in the contract until appellants had determined whether they would build a new building or remodel the old one, then appellee was excused for not having the walls completed by May 1st and appellants should not be allowed damages on account of such delay.

Appellants insist that there was no agreement or understanding for further delay; that there was nothing in their acts which excused appellee from completing the party wall at the time mentioned and that these instructions should not have been given for the reason that they were not based upon any legitimate evidence in the case. While the evidence upon this subject is not altogether clear and convinc-

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ing, yet upon the whole it tended to support appellee's position and was sufficient in our opinion to warrant the giving of the instructions named.

The amount provided to be paid appellants by the contract for building the party wall was \$175 while the judgment is only for \$120, leaving a balance of \$55, which was allowed appellants under their claim of set-off.

The evidence of the respective parties upon the questions involved in the pleas of set-off was very conflicting, but upon consideration of the same we find nothing to warrant us in disturbing the verdict on the ground that the amount allowed appellants under those pleas was not sufficient. The judgment of the court below is accordingly affirmed.

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1. **EQUITY JURISDICTION**—*To Restrain Removal of Party from Office.*—In this State a court of equity has no jurisdiction to restrain the removal of a party from office, even though such removal may be unjustly or improperly made, or to contest the right of a party to remain in office.

2. **SAME**—*Subject-matter of.*—The subject-matter of the jurisdiction of the court of chancery is civil property. The court is conversant only with questions of property and the maintenance of civil rights, and its jurisdiction is founded upon injury to property, whether actual or prospective. It has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right to property, nor do matters of a political character come within its jurisdiction.

3. **QUO WARRANTO**—*Proper Remedy Where Officer Has Been Improperly Removed.*—Where an officer has not been properly removed, and a successor can not, therefore, be legally appointed, the question can be settled by quo warranto against the person claiming to be his successor in office.

4. **MANDAMUS**—*When the Proper Remedy.*—Where the title to the office is not in dispute, mandamus will lie to restore the person entitled to it.

Bill for an Injunction.—Appeal from the Circuit Court of Livingston County; the Hon. JAMES H. MOFFETT, Judge presiding. Heard in

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this court at the April term, 1902. Affirmed. Opinion filed August 7, 1902.

C. C. STRAWN and H. H. McDOWELL, attorneys for appellant.

H. J. HAMLIN, attorney-general, for appellee; GEORGE B. GILLESPIE, of counsel.

An injunction will not issue to prevent city officials from removing a member of the police force on the ground that they are acting from improper motives and are so prejudiced that he can not have a fair hearing. *Reeves v. Griffin*, 29 Weekly Law Bulletin, 281; *Reeves v. Rose*, Id.

The power to hold an election is a political and not a judicial one, and a court of equity has no jurisdiction to restrain officers from the exercise of such power. *Harris v. Schryock*, 82 Ill. 119.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This was a bill in equity by James A. Marshall against the Board of Managers of the Illinois State Reformatory, Samuel Fallows, John J. Lane, Garret De Forest Kinney as managers, and M. M. Mallary as general superintendent of the reformatory and ex-officio secretary of said board of managers, seeking to enjoin them from deposing or removing him from the office of physician of said reformatory, and from in any manner excluding him from the institution or interfering with or obstructing him in the administration of the duties of his said office.

A temporary injunction was granted and an answer filed in which the defendants prayed the same advantage thereof as if they had pleaded or demurred to the bill of complaint. A motion was then made by the defendants to dissolve the injunction. Numerous affidavits, both in support of and against the motion to dissolve, were presented by the respective parties.

The cause was heard upon the bill of complaint, with the amendment thereto, the answer and replication, and upon such pleadings alone. There was a decree in which the court found that it had no jurisdiction in the premises,

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and the temporary injunction was accordingly dissolved and the bill dismissed for want of equity. The presiding judge certified that he did not consider any of the affidavits in passing upon the cause, but that he heard and determined the questions involved, solely upon the legal proposition presented, "as to whether or not equity had jurisdiction of the subject-matter," and held that equity did not have such jurisdiction; that it was for such reason alone the injunction was dissolved and the bill dismissed. The complainant below appealed and the temporary injunction was continued in force, by order of the court, pending the appeal. The bill and the amendment thereto set up portions of the act establishing the Illinois State Reformatory, providing, among other things, for the appointment, by the board of managers, of a general superintendent, chaplain and physician, with power on the part of the board to remove them for causes impairing the faithful and intelligent administration of their office, after opportunity given to the officers so charged, to be heard upon written charges; that in pursuance of such provision of said act, appellant was appointed by the board of managers, physician of said institution, and that from such date to the present time he has exercised and is still exercising the functions of his office with punctuality, skill and fidelity, and has never been guilty of any act or neglect of duty impairing the faithful and intelligent administration of his said office; that certain of the members of the board of managers, constituting a quorum of the board, together with the secretary of the board, conspired with certain other persons, who are named, for the purpose of fraudulently, wrongfully and illegally deposing appellant from his office of physician of said reformatory for political and partisan purposes; that said charge was not made in good faith, but was used as a pretext and subterfuge to fraudulently, wrongfully and illegally depose appellant from his office and appoint another person thereto to further such political and partisan purposes; that various attempts were made, which are set out at length, by certain members of the board and

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others, to compel appellant to resign, which were unsuccessful; that on September 20, 1901, charges were preferred against appellant of neglect of duty, but that appellant has never failed or refused to perform any service or duty requested of him or brought to his attention by the board of managers, general superintendent, or any other official of said reformatory; that the board of managers had declared its intention and threatened to remove appellant from said office and appoint another person in his stead, and that he was without remedy, save in a court of equity. An injunction was accordingly prayed for, as above set forth. The answer denies any combination on the part of appellees to fraudulently, wrongfully or illegally remove and depose appellant from his said office, but alleges that appellant has been 'guilty of neglect of his duties as physician for the institution. It also avers that on September 20, 1901, the day the charges against appellant above mentioned were filed with the board of managers, notice was given, according to law, to appellant, to appear before the board on the 27th day of September, 1901, to answer said charges.

This bill was filed on September 26, 1901, the day before the time fixed by the board for hearing the charges.

The question presented is whether or not the pleadings show such a case as to warrant a court of equity in exercising its jurisdiction and granting the relief sought. We regard the law as well settled in this state that a court of equity has no jurisdiction to restrain the removal of a party from office, even though such removal may be unjustly or improperly made, or to contest the right of a party to remain in office.

In the case of *Delahanty v. Warner et al.*, 75 Ill. 185, a bill was filed by Delahanty claiming that he had been unlawfully removed from his office as superintendent of streets in the city of Peoria, and seeking to enjoin the aldermen and mayor from appointing a successor and from interfering with complainant in the discharge of his duties as street commissioner. The Supreme Court in passing upon the case used the following language :

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"The court below dissolved the temporary injunction which had been issued and dismissed the bill for want of equity. In this we perceive no error. Appellant's remedy was complete at law. High on Injunction, Sec. 781. If he was not properly removed and a successor can not, therefore, be legally appointed, the question can be settled by quo warranto against the person claiming to be his successor in office. *People v. Forquer*, Breese (Beecher's Ed.), 104; *People v. Matteson*, 17 Ill. 168. By mandamus, the mayor and aldermen may be compelled to restore to him any evidence of his right to the office, or any property pertaining thereto which they may have improperly withheld from him. *People v. Head*, 25 Ill. 325; *People v. Kilduff*, 15 Ill. 492; *People v. Hilliard*, 29 Ill. 414. And where the title to the office is not in dispute, mandamus will lie to restore the person entitled to it. *Street v. County Commissioners*, Breese (Beecher's Ed.) 50; *People v. Stevens*, 5 Ill. 616. Nor can there be any doubt of appellant's having a complete remedy at law for any fees and emoluments pertaining to the office of which he may have been unlawfully deprived by the action of the mayor and aldermen."

In the case of *Sheridan v. Colvin*, 78 Ill. 237, it appeared that the city council had passed an ordinance, approved by the mayor, providing for the appointment of a city marshal and abolishing the board of police of the city of Chicago. It also provided that the marshal should exercise the authority formerly exercised by that board. A temporary injunction was issued upon a bill filed by the commissioners of the board of police, restraining the mayor, common council and certain other officers from acting under said ordinance. In discussing the question as to whether a court of chancery had jurisdiction to interfere in such case, it is said by the court:

"We are clearly of opinion that it had not. The subject is purely political. The only title to relief shown by the bill is that arising from the mere fact of complainants being police commissioners, vested, as it is alleged, with the entire control of the police force, etc. The bill does not go upon the theory of any property right, but is an application to a court of equity to restrain the city council and other officers of the city from carrying said ordinance into effect, on the ground that it will deprive them of the functions of their office. It is elementary law, that the subject-matter

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of the jurisdiction of the court of chancery is civil property. The court is conversant only with questions of property and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which the jurisdiction rests. The court has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right to property. Nor do matters of a political character come within the jurisdiction of the court of chancery. * * * Again in *High on Injunction*, the author says: 'A court of equity is not a proper tribunal for determining disputed questions concerning the appointment of public officers, or their right to hold office, such questions being purely of a legal nature, and cognizable only by courts of law. Thus, equity will not interfere, by injunction, to restrain persons from exercising the functions of public offices, on the ground of the illegality of the law under which their appointments were made, but will leave that question to be determined by a legal forum; and a temporary injunction, granted *pendente lite*, and until the question of the validity of the law under which defendants claim their office can be determined, will be dissolved.'

In *Fletcher v. Tuttle*, 151 Ill. 41, it is said :

The question, then, is, whether the assertion and protection of political rights, as judicial power is apportioned in this state between courts of law and courts of chancery, are a proper matter of chancery jurisdiction. We would not be understood as holding that political rights are not a matter of judicial solicitude and protection, and that the appropriate tribunal will not, in proper cases, give them prompt and efficient protection, but we think they do not come within the proper cognizance of courts of equity."

In *Heffran v. Hutchins*, 160 Ill. 550, it is held :

"It is not within the jurisdiction of a court of equity to interfere with the public duties of the departments of government. Its jurisdiction pertains only to questions of the maintenance of civil rights—property rights—as contradistinguished from political rights. It can have no jurisdiction to determine political questions between the mayor and council of a city concerning the appointment and removal of officers, nor can it exercise jurisdiction in determining the right of a party to an office."

The doctrine laid down by the above cases is not peculiar to the reports of this state alone. In the case entitled

In re Sawyer, 124 U. S. 200, the court announces the following rule :

“ It is equally well settled that a court of equity has no jurisdiction over the appointment and removal of public officers, whether the power of removal is vested, as well as that of appointment, in executive or administrative boards or officers, or is intrusted to a judicial tribunal. The jurisdiction to determine the title to a public office belongs exclusively to the courts of law, and is exercised either by certiorari, error or appeal, or by mandamus, prohibition, quo warranto, or information in the nature of a writ of quo warranto, according to the circumstances of the case, and the mode of procedure established by the common law or by statute.”

Such right as appellant had to the office in question was purely a political right and not a property right.

We therefore conclude from the above authorities, that a court of chancery had no jurisdiction over the subject-matter of the bill filed in this case. If appellant shall be unlawfully removed his remedy is at law and not in equity.

The decree of the court below dissolving the temporary injunction and dismissing the bill for want of equity, was proper and is accordingly affirmed.

Frank Galt v. Edward Woliver.

1. **EVIDENCE**—*That Other Horses Were Frightened at an Obstruction in the Road.*—Evidence that other horses were frightened by an obstruction in the road is competent as tending to show that it was dangerous and unsafe, and that horses were likely to be frightened by it.

2. **TELEPHONES**—*Conversations Over.*—Proof of a conversation over the telephone is competent.

3. **HIGHWAYS**—*Leaving Obstructions in.*—It is unlawful to leave standing upon a public highway from one to four months, a machine whose appearance is calculated to frighten ordinarily gentle horses passing by, and he who does so is liable to a person who, in the exercise of due care, is injured by the actions of an ordinarily gentle horse caused by his fright at the obstruction.

4. **PLEADING**—*Averments Laid Under a Videlicet.*—An averment laid under a videlicet need not be proved precisely as laid.

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Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Whiteside County; the Hon. FRANK D. RAMSAY, Judge presiding. Heard in this court at the April term, 1902. Affirmed. Opinion filed July 18, 1902.

C. L. SHELDON, attorney for appellant.

H. H. WAITE and C. C. McMAHON, attorneys for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

This was an action on the case brought by Woliver against Galt. In an appropriate declaration plaintiff charged that defendant had a large machine, called a corn shredder, of such size, shape, color and unusual appearance as to be likely to frighten ordinarily gentle horses, if it was left on the public highway unattended; that defendant left said machine for several months unattended on a public highway known as the Erie and Denrock road, defendant knowing the danger to persons driving along said highway because of the strange appearance of said machine and its tendency to frighten horses; that defendant unlawfully, and in willful disregard of the rights of the public and of the directions of the highway commissioners in charge to remove said machine, neglected and refused to remove it, and unlawfully allowed it to remain in the highway; that on August 3, 1900, plaintiff with all due care was traveling on said highway in a buggy drawn by a horse of an ordinarily gentle disposition, carefully and prudently driven; that said horse became frightened by said machine and unmanageable and threw plaintiff from said buggy to the ground, and plaintiff's leg was broken, and he was seriously and permanently injured. Defendant pleaded not guilty. Plaintiff obtained a verdict for \$750 and a judgment thereon. Defendant appeals. It is conceded the damages are not excessive.

Defendant's servants were hauling said machine by a road engine. Two cogs of certain machinery broke, and defendant's servants were obliged to leave the machine at the side of the road. Defendant claims it was so left on June 22d. Plaintiff claims defendant left it there the last of

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March or first of April. The preponderance of the proof on this subject is with plaintiff, but the date is of slight importance, for even by defendant's claim the machine was left there from June 22d to August 3d, and no reasonable excuse appears for thus obstructing a highway for that length of time. Whether the machine was calculated to frighten ordinarily gentle horses was a question of fact for the jury. It was described by many witnesses. It did frighten this horse. The proof is other horses had shied at it, and that the traveled way had veered to one side at that point because horses would not go straight by it. Evidence that other horses were frightened by it was competent, as tending to show it was dangerous and unsafe, and that horses were likely to be frightened by it. *City of Elgin v. Thompson*, 98 Ill. App. 358. It is argued that the horse was frightened by an umbrella carried in the buggy, and not by the shredder. The umbrella had been up while the parties traveled two and a quarter miles, and the horse did not take fright till he was opposite the machine. This was a question for the jury, and we do not doubt it was correctly decided. It is argued there is no sufficient proof the place of the accident was a public highway. The proof was that it was the main traveled thoroughfare between Erie and Denrock, was fenced on each side, had been traveled as a public highway from forty to sixty years, and was in charge of a highway commissioner. The proof that it was a public highway was ample for this collateral proceeding. The court admitted proof that one Shaw, a telephone manager, at the request of the highway commissioner, had two conversations with defendant, the first of which, at least, was over the telephone. At the first conversation Shaw told defendant he was instructed to tell him his shredder was in the road, that it was a menace to the safety of the traveling public, and that he was asked to remove it, to which defendant replied that the roads were muddy and the weather was bad, and he would remove the machine as soon as the roads became passable or in condition so he could. Ten days or two weeks later Shaw conveyed to

defendant the message that the obstruction was still in the road; that the roads were getting hard and it was possible for him to remove it; that it was still a menace to the traveling public and teams could hardly be gotten by it, and defendant replied he would attend to it as soon as he could get a man down there to look after it. This was a considerable time before plaintiff was injured. The objection to this was that a notice thus sent was immaterial and incompetent. Notice to the plaintiff of the danger to teams was competent, even if it did not clearly appear that he was told the notice was from the highway commissioner. It seems to be argued here that it was not competent to prove such a conversation over a telephone. Shaw testified it was the defendant he talked with, which clearly implied he recognized defendant's voice, and he was not cross-examined. Proof of a conversation over the telephone is competent. *Snively v. Colburn*, 78 Ill. App. 93. Defendant testified he did not remember such a conversation. It was for the jury to decide whether it was had. It is argued plaintiff jumped from the buggy instead of being thrown from it, and therefore he can not recover under the declaration. As the horse began to plunge, plaintiff who was driving, was pulled from the seat and then fell back upon it, and the supports of the seat on that side broke down, and he fell out of the wagon. It is entirely possible that as he fell he may have attempted to save himself by jumping or springing, but that would not show the charge he fell was not proven, nor was any such variance pointed out by objection to the testimony, so as to give plaintiff an opportunity to amend. It is clear from the proof he fell, even if as he fell he also jumped or tried to do so. We hold that it was unlawful to leave standing upon a public highway from one to four months a machine whose appearance is calculated to frighten ordinarily gentle horses passing by, and that he who does so is liable to a person who in the exercise of due care is injured by the actions of an ordinarily gentle horse caused by his fright at the obstruction. *City of Elgin v. Thompson*, *supra*; *Caldwell v. Town of Pre-emption*, 74 Ill. App. 32.

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The court modified some instructions offered by defendant, and refused others. The given instructions fully stated the law of the case from defendant's standpoint. The declaration gave the dimensions of the shredder, and defendant sought to have the court instruct the jury this description was material, and if not proved as alleged the verdict must be for defendant; and he contends the proof did not sustain the dimensions given in the declaration. There was a discrepancy in the proof as to the size, but plaintiff had plenty of proof it was of about the size averred. But the averment was under a *videlicet*, and did not require to be proved precisely as laid. The exact size was not material. The material thing was that it was of such size, shape and appearance, as to be calculated to frighten ordinarily gentle horses. We find no reversible error in the record.

The judgment is therefore affirmed.

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Robert Hammond, William Hammond and James M. Hunter v. Wellington Doty.

1. **PRACTICE—Bill of Exceptions.**—It is for the trial judge to certify in the bill of exceptions what rulings were made by him and what exceptions were taken before him at the trial. In the absence of an exception to the ruling or judgment of the court appearing in the bill of exceptions, the sufficiency of the evidence to support the finding is not presented for decision.

2. **SAME—When Admission of Incompetent Evidence Will Not Require Reversal.**—In a cause tried by the court without a jury, the admission of incompetent evidence will not require a reversal if there is sufficient competent proof to sustain the finding.

Debt.—Appeal from the Circuit Court of Carroll County; the Hon. JAMES S. BAUME, Judge presiding. Heard in this court at the April term, 1902. Affirmed. Opinion filed July 18, 1902.

JAMES M. HUNTER, *pro se*, and FRANK J. STRANSKY, attorney for appellants.

D. S. BERRY, attorney for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court. Wellington Doty recovered a judgment before a justice

of the peace of Carroll county in an action of forcible entry and detainer brought by him to recover possession of a certain piece of land. Two of the defendants perfected an appeal by filing a bond before the justice of the peace in the penal sum of \$400, which the justice approved. In the Circuit Court the trial resulted in a like judgment which was affirmed in *Hammond v. Doty*, 84 Ill. App. 19 and 184 Ill. 246. A writ of restitution was then issued and served, and Doty was placed in possession of the premises. Doty then brought this action of debt upon the appeal bond given before the justice, and upon a trial before the court without a jury recovered a judgment in debt for \$400, and awarding the plaintiff \$400 damages and costs, the debt to be satisfied upon payment of the damages. This is an appeal by defendants from that judgment.

Errors in pleading were committed by both plaintiff and defendants, but no rulings upon the pleadings are assigned for error. The case was tried upon the pleas of *non damnificatus* and *non est factum*. No propositions of law were presented. The bill of exceptions does not show that defendants made a motion for a new trial or excepted either to the finding or to the judgment of the court. The clerk in his record has undertaken to show exceptions were taken but such exceptions can not be preserved by the statement of the clerk. It is for the trial judge to certify in the bill of exceptions what rulings were made by him and what exceptions were taken before him at the trial. In the absence of an exception to the finding or judgment of the court appearing in the bill of exceptions the sufficiency of the evidence to support the finding is not presented for decision. (*Martin v. Foulke*, 114 Ill. 206; *Firemen's Ins. Co. v. Peck*, 126 Ill. 493; *Gage v. Goudy*, 128 Ill. 566; *Cochran v. Village of Park Ridge*, 138 Ill. 295; *Bailey v. Smith*, 168 Ill. 84; *C., B. & Q. R. R. Co. v. Hazelwood*, 194 Ill. 69; *Mayor of Roodhouse v. Briggs*, 194 Ill. 435.) Under the principles announced in the cases above cited and in many others, this record does not present for decision many of the questions argued by appellants. The pleadings also

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do not put in issue some of the defenses which appellants chiefly rely upon in this court.

If, notwithstanding the omissions above referred to, the rulings of the court upon the evidence are presented for decision, it is sufficient to say of them (1) that the supposed variance between the bond and the declaration was not made the ground of objection to the bond, and the variance was not pointed out so it could be obviated by amendment; (2) that the difference between the description of one side of the tract in the bond and declaration as a certain quarter section line "*extended west*," and the language in a question put to a witness describing it as said quarter section line "*extending west*," was immaterial, and that the variance was not pointed out at the trial; (3) that the statement of plaintiff on cross-examination in a single answer that the land was in section 31, was evidently a mistake, as he had previously testified it was in section 30, and all the proof shows it was, and no attention was called to the matter during the trial so it could be corrected; (4) that though some of the witnesses who testified to the value of the use and occupation did not know the legal description of the premises, yet they did know it as the land in dispute between Doty and the Hammonds, and there was no proof that any land was in dispute between those parties except that described in the bond and declaration; (5) that the right of the plaintiff to the possession of the premises as against defendants was settled in the forcible entry and detainer suit; and if it could be again litigated in this suit on the appeal bond defendants filed no plea presenting such an issue; (6) that the questions the court refused to permit to be put by defendants to plaintiff on cross-examination, and of which complaint is specially made, were not proper cross-examination; and (7) that if any witness to the value of the use and occupation placed his estimate in any respect upon an erroneous basis, there was no jury to be misled by it; and defendants were not harmed by it, as the competent proof showed the damages plaintiff had suffered exceeded the penalty of the bond. In a cause tried by the court

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without a jury the admission of incompetent evidence will not require a reversal if there is sufficient competent proof to sustain the finding. (Palmer v. Meriden Britannia Co., 188 Ill. 508.)

The judgment is therefore affirmed.

Murray Iron Works Co. v. DeKalb Electric Co.

1. *SALES—Implied Warranty.*—The manufacturer of an article for a specific purpose impliedly warrants the quality of the material and the goodness of the workmanship.

Assumpsit, to recover price of defective boiler. Appeal from the Circuit Court of DeKalb County; the Hon. CHARLES A. BISHOP, Judge presiding. Heard in this court at the April term, 1902. Affirmed. Opinion filed July 18, 1902.

JONES & ROGERS, attorneys for appellant.

CARNES & DUNTON, attorneys for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

The Murray Iron Works, engaged in the manufacture of steam boilers at Burlington, Iowa, brought this suit against the DeKalb Electric Company to recover the price of a steam boiler, manufactured by plaintiff for defendant and delivered to defendant. The declaration contained a special count upon the contract, and the common counts. Defendant filed the general issue, with a notice that defendant would prove the boiler was bought for a certain purpose and was defective and unfit for said purpose, and that by reason thereof defendant had been greatly damaged and had expended much money and material in endeavoring to remedy said defects because thereof, and that there were latent defects in the workmanship upon said boiler not discoverable by inspection, etc. The total contract price, including certain extra patterns, was \$1,005, less freight charges. Plaintiff recovered a verdict for \$200. It moved

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for a new trial. That motion was denied, and there was a judgment for plaintiff upon the verdict, from which judgment plaintiff appeals.

Plaintiff was the manufacturer of the boiler, and knew the use for which it was designed. There was an implied warranty that the boiler was of sound material and made in a workmanlike manner. (*Beers v. Williams*, 16 Ill. 69; *Hallock v. Cutler*, 71 Ill. App. 471.) There was proof by plaintiff tending to show that the boiler met the requirements of the contract. There was proof by defendant that there were latent defects in the workmanship which were not discovered upon inspection; that the rivets did not fill the holes, and when the boiler was put into actual use it became loose about the rivets and around the ends of the flues so that steam and water escaped; that then, when calked and tightened, it would run for a short time, but that in four to six days it would again leak so badly as to require to be put out of use and repaired; and that much effort was expended, by both plaintiff and defendant, to make it a useful boiler, but unsuccessfully, and it was valueless except for old iron. Plaintiff sought to show this condition was due to misuse of the boiler by defendant. There was much conflict in the evidence upon these questions, but the preponderance of the proof seems to have been with defendant, and we can not say the verdict should have been for plaintiff for the contract price. We would be better satisfied if the jury had awarded a somewhat larger sum, but do not feel warranted in disturbing the verdict on that account.

Plaintiff claims that the Hartford Steam Boiler Inspection and Insurance Company was an arbitrator between plaintiff and defendant, that it inspected and approved this boiler, and that, in the absence of fraud, that inspection bars defendant from the defense here set up. The main business of the Hartford Company is to inspect boilers to see if they are safe and fit for insurance; to insure boilers against explosion; and to inspect them after insurance to see that they are kept on a safe basis. Defendant desired its boiler to be insured. It obtained its specifications from

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the Hartford Company, and sent them to plaintiff and asked for proposals to build such a boiler, and plaintiff made proposals, suggesting a modification. Defendant then wrote ordering a boiler made "in accordance with the Hartford drawings and specifications enclosed," saying, also, "We have to-day notified the Hartford people we have placed an order with you, and ask them to make such inspection as they see fit." This order was the contract. The closing part of the specifications reads as follows: "All the materials and workmanship to be subjected to the inspection and approval of the Hartford Steam Boiler Inspection and Insurance Company." When the boiler was completed the Hartford Company issued a certificate showing it had inspected the boiler, giving its dimensions and general description, and then stating "the same has been tested by hydrostatic pressure to the extent of 200 pounds per square inch, without developing any weakness or defects." On the same day it issued a policy of insurance on said boiler to plaintiff, and plaintiff assigned and mailed the policy to defendant. The Hartford Company did not in any other way or at any other time inspect the materials or workmanship of the boiler, and its approval thereof was only by said certificate and policy. We conclude the real meaning of the clause of the specifications above quoted is that the boiler was to be subject to the inspection and approval of the Hartford Company for purposes of insurance; and that it was not meant that the Hartford Company should act as an arbitrator. Certainly nothing in the contract warrants the claim that this single inspection by an agent of the Hartford Company was to relieve the manufacturer against liability for latent defects of workmanship, not discoverable by such inspection; and defendant based its defense upon such latent defects.

The rulings of the court upon the instructions conformed to this view of the case. We find no reversible error in rulings upon evidence. The judgment is affirmed.

Arthur Burrall v. People of the State of Illinois.

1. **PRACTICE—Evidence Authorizing Execution in Scire Facias—Recognizance.**—The recognizance of record and judgment of forfeiture are competent and sufficient evidence, under appropriate averments in *scire facias*, to authorize judgment of execution according to the form, force and effect of the recognizance.

2. **SCIRE FACIAS—Sec. 17, Div. 3, Criminal Code.**—Sec. 17, Div. 8, of the Criminal Code, providing that after the return of the *scire facias* the court shall thereupon enter judgment by default against the defendants for the amount of the recognizance unless defendants shall appear and defend such cause, etc., does not require in that respect, any different procedure on *scire facias*, from that in force in this state prior to that time.

3. **RECOGNIZANCE—Procedure after Default.**—After default in performance of the condition of a recognizance, the judgment may be that said judgment of forfeiture be made absolute and that the people have judgment of execution against the defendants according to the force, form and effect of said recognizance. There need be no money judgment, as the recognizance is of record, and the order is for an execution, according to said recognizance.

4. **SAME—Executions Ordered at Different Times.**—It is permissible to order an execution against the defaulting defendants at one time and an execution against the defendant who goes to trial at another time.

Scire Facias.—Appeal from the Circuit Court of Rock Island County; the Hon. WILLIAM H. GEST, Judge presiding. Heard in this court at the April term, 1902. Affirmed. Opinion filed July 18, 1902.

SWEENEY & WALKER, attorneys for appellant.

HAROLD A. WELD, State's Attorney for Rock Island County, for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

Edward O'Brien was indicted for larceny at the May term, 1898, of the Rock Island Circuit Court, and his bail fixed at \$500. He entered into recognizance for said sum, with Elmer Humberstone and Arthur Burrall as sureties. O'Brien was tried at the same term of court and, as appears from statements of counsel for appellant and inferentially from the testimony, was convicted. After the verdict was rendered, however, O'Brien was permitted to leave the

court room. On July 2, 1898, which was one of the days of said May term, the defendant and his sureties were called in open court and defaulted. The court thereupon declared the recognizance forfeited and ordered the clerk to issue a *scire facias* against the defendant and his sureties, returnable to the first day of the next term.

It appears from the court records that the *scire facias* was duly issued on July 6th, following, although it bore the date of May 6, 1898. The writ was afterward returned served on Arthur Burrall, the sheriff reporting by his return that he could not find in his county the said Edward O'Brien and Elmer Humberstone. At the May term, 1900, of said court, the defendants O'Brien and Humberstone were again called, and having made default, judgment was entered against them for the sum of \$500 and costs. At the same time a rule was entered against the defendant Arthur Burrall to plead, which he did. Afterward at the September term, 1901, Burrall presented and asked leave to file an additional plea which, in substance, averred that he was released and discharged by reason of the fact that at the May term, 1900, judgment had been recovered upon the recognizance against O'Brien and Humberstone. Objection having been made, the court refused leave to file the plea. Afterward at the same term a trial was had before a jury and at the close of the proofs the court, on motion of the state's attorney, excluded the defendant Burrall's evidence and directed the jury to find a verdict for the plaintiff, which was accordingly done.

Appellant insists that the judgment should be reversed for three reasons:

First. That the date of the *scire facias* is prior to the time the forfeiture was entered.

It is true the *scire facias* was dated May 6, 1898. This is, however, an obvious mistake; for it recites that the indictment was returned on the 12th day of May, 1898; that the recognizance was entered into on May 13, 1898, and that judgment of forfeiture was entered on the recognizance at a later date. The court record also recites that the *scire*

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facias was issued on July 6th. It is to be noted, too, that there was no plea which raised the question now presented. We are therefore of opinion that this mistake, which was evidently a clerical error, presents no ground for reversal of the judgment.

Second. It is objected that "there is no judgment, as required by law, against Burrall; there is only an order for execution for \$500 on recognizance, which is not a judgment as now required by law." The judgment of the court in this case was that the people "have execution against said defendant Arthur Burrall for the sum of \$500, according to the force, form and effect of his said recognizance, together with their costs in this behalf expended." Prior to 1869, the proceeding was by common law, and our courts held that the proper course, on default in performance of the condition of a recognizance, was to enter a judgment declaring the same forfeited. "The recognizance of record and judgment of forfeiture are competent and sufficient evidence, under appropriate averments in *scire facias*, to authorize judgment of execution 'according to the form, force and effect of the recognizance.'" The People v. Witt, 19 Ill. 169, and cases cited; Landis v. The People, 39 Ill. 79; Combs v. The People, 39 Ill. 183.

In 1869 the provision which now appears as section 17 of division 3 of the Criminal Code was adopted. It provided that after the return of the *scire facias*, "the court shall thereupon enter judgment by default against the defendants for the amount of the recognizance unless defendants shall appear and defend such cause," etc. It is claimed by appellant that the above provision of the statute contemplates a judgment for the amount of the recognizance. Our Supreme Court, in cases decided since the enactment of the statute, have treated the matter as not requiring in that respect, any different procedure on *scire facias*, from that in force in this State prior to that time. After default or issue found for the people on pleadings, the judgment may be that said judgment of forfeiture be made absolute and that the people have judgment of execution against the

defendants according to the force, form and effect of said recognizance. *Kepley v. People*, 123 Ill. 367 (380); *Peacock v. The People*, 83 Ill. 331. There need be no money judgment, as the recognizance is of record and the order is for an execution, according to said recognizance. We therefore conclude that the judgment entered in this cause was in accordance with the law.

Third. Appellant claims that the court erred in refusing to allow him to file an additional plea setting up the recovery of the judgment against the two other defendants as a release or discharge of any right of action against him. His position is, there being three defendants in the suit, there could be but one final judgment, and that must be a unit disposing of the case as to all.

In the case of *McFarlan v. The People*, 13 Ill. 9, it was contended that it was erroneous to enter judgment against two of the cognizors before the other was brought into court. It was there held by the court after referring to several cases, that the principle was settled that "on a *scire facias* upon a joint and several recognizance, where service is had on one or more of the cognizors, and a return of *nihil* as to the rest, execution may be awarded against those served with process." As our courts have given the same construction to the statute in regard to this proceeding which they gave to it prior to the law of 1869, as above mentioned, we are of opinion that, under the case last referred to, it is permissible to order an execution against the defaulted defendants at one time and an execution against the defendant who goes to trial at another time. The additional plea, therefore, presented no defense to the action and the motion for leave to file it was properly denied. We find no error in the record in this case and the judgment of the court below is accordingly affirmed.

City of Streator v. Johanna O'Brien.

1. **INSTRUCTIONS—Defective Sidewalks.**—An instruction which tells the jury that when the sidewalk of a city is out of repair and remains out of repair for such a length of time that the public authorities in the exercise of reasonable care and diligence ought to have discovered the fact then actual notice to such authorities of the condition of the walk is not necessary to hold the city liable, is proper.

2. **SAME—Rule for Fixing Damages.**—An instruction which stated that though the jury might believe from the evidence that the sidewalk was not in ordinarily safe repair and condition, still if they further believed from the evidence that the city exercised ordinary care for the purpose of keeping the same in repair and condition then they should find for the defendant, was modified by the court so as to provide that the city should be held harmless, under such circumstances, only in the event that it and its officers did not know of the unsafe condition of the sidewalk and could not have known of it by the exercise of reasonable care. *Held*, such modification stated a correct principle of law and was properly made.

Action on the Case, for personal injuries. Appeal from the Circuit Court of LaSalle County; the Hon. HARVEY M. TRIMBLE, Judge presiding. Heard in this court at the April term, 1902. Affirmed. Opinion filed July 18, 1902.

P. J. LUCY, attorney for appellant.

REEVES & BOYS, attorneys for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This was a suit by appellee to recover damages for injuries alleged to have been received by her, by reason of a fall on a defective sidewalk in the city of Streator, on October 2, 1900. There was an appropriate declaration, to which the general issue was filed. The trial resulted in a verdict and judgment in favor of appellee for \$1,000.

Appellee was about sixty-five years of age, was quite a large woman, weighing from 190 to 200 pounds, and prior to the accident enjoyed good health. By reason of the fall her arm was broken, her shoulder badly bruised, her face and body cut and bruised, and she was confined to her bed for about two months. She suffered considerable pain and

since the injury has been unable to do any housework. There was evidence that she would always suffer some inconvenience from her injuries. Under such circumstances the damages can not be said to be so large as to warrant a reversal of the judgment on that ground.

Appellant complains of the sixth and seventh instructions given for appellee. The sixth instruction told the jury that when the sidewalk of a city is out of repair and remains out of repair for such a length of time that the public authorities, in the exercise of reasonable care and diligence ought to have discovered the fact, then actual notice to such authorities of the condition of the walk is not necessary to hold the city liable, etc. The object of this instruction was simply to explain that constructive notice might take the place of actual notice to the city of the existence of defects in the sidewalk, and taken in connection with the other instructions, could not have misled the jury.

The seventh instruction laid down the rule for fixing the amount of damages and told the jury, in substance, that in case plaintiff was entitled to recover, they should find for her such an amount of damages as they believed, from the evidence, would compensate her for the injury received and for her loss of time in endeavoring to be cured, and her expenses necessarily incurred in respect thereto, if any such loss or expenses were proved; also for the pain and suffering undergone by her, if any had been proved; also any permanent injury which they may believe from the evidence she has sustained. We find that there was evidence touching all the elements of damages mentioned and the instruction was properly given.

Instruction No. 20 offered by defendants told the jury that although they might believe from the evidence that the sidewalk was not in ordinarily safe repair and condition, still if they further believed from the evidence that the city exercised ordinary care for the purpose of keeping the same in safe repair and condition, then they should find for the defendant. This instruction the court modified in such a way as to provide that the city should be held harm-

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less, under such circumstances, only in the event that it and its officers did not know of the unsafe condition of the sidewalk, and could not have known of it by the exercise of reasonable care. We are of opinion that the modification stated a correct principle of law and was properly given.

The objection that the verdict was not supported by the proofs is not well taken. A preponderance of the evidence shows that appellee was, at the time she was injured, proceeding along the walk with due care; that the walk was out of repair at the place where the injury occurred and had been so for some time; that the city knew of the defect or could have known of it by the exercise of reasonable care, and repaired it.

The final complaint is that the court erred in permitting evidence to go to the jury that on the next morning after the accident, the city caused the sidewalk to be fenced off where the accident occurred, and on the following day caused the walk to be removed.

It is unnecessary for us to discuss the question whether or not this evidence was objectionable, as there was evidence to the same effect, fully establishing these facts, which was not objected to by appellant. But in any event the action of the court in admitting this testimony could not have injured appellant, as there was ample evidence to show its negligence in regard to the sidewalk in question.

The judgment of the court below is accordingly affirmed.

Mary Kelly and Frank Kelly v. James Butterworth.

1. **PROMISSORY NOTES—*Mortgages*.**—The court reviews the evidence in the case, and holds that it does not support the finding of the special master.

Bill for Foreclosure.—Appeal from the Circuit Court of Lake County; the Hon. CHARLES H. DONNELLY, Judge presiding. Heard in this court at the April term, 1902. Reversed and remanded. Opinion filed July 18, 1902.

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Kelly v. Butterworth.

C. N. DURAND and BAILY, HALL & SPUNNER, attorneys for appellants.

WHITNEY, UPTON & WHITNEY, attorneys for appellee.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

February 1, 1898, appellant Mary Kelly gave to appellee, James Butterworth, her promissory note for \$400, with interest at the rate of seven per cent per annum, payable three years after date. On the same date she and her husband, Frank Kelly, also an appellant, executed a mortgage on certain real estate to secure the payment of said note.

The following June or July some controversy arose between the parties in regard to the use of the mortgaged property for gardening purposes. The mortgagee, Butterworth, objected to such use of the premises. The appellant Frank Kelly, and Butterworth, the mortgagee, then agreed that the mortgaged indebtedness might be subsequently paid, although the same was not due.

February 1, 1899, when the first year's interest became due, Butterworth went to Kelly's store and asked for some money. Kelly told him he had all the money for him, both principal and interest. The two went together to a bank at Waukegan, where Butterworth was accustomed to do his business. Before reaching the bank they stopped at the place of business of one Nick Wetzel, to whom Butterworth stated in Kelly's presence that Kelly was going to pay him all his money. When they arrived at the bank they occupied a desk for some time, conversing with each other. It is claimed by Kelly that he then paid Butterworth \$428, the amount of the principal and interest of said note. The undisputed evidence is that Butterworth immediately presented the note to Fred Darst, an employe of the bank, who at the request of one of the parties, indorsed upon the face of the note in two separate places, in large letters, in red ink, "Paid, 2/1/99." Butterworth then put the note in his pocket and they returned to Wetzel's, where Butterworth stated in the presence of Wetzel and

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another witness that Kelly had paid him every cent he owed him.

Shortly thereafter Butterworth left, stating to Kelly that he was going to take the note to the court house, presumably for the purpose of having the mortgage released, and for Kelly to wait for him, that he would return in a short time. Butterworth never returned.

Thereafter Kelly made frequent demands upon him to release the mortgage, but without result. Nothing further occurred until February, 1900, when Butterworth asked Kelly for some money. Kelly told him he owed him nothing, that he had paid him in full at the bank. Butterworth disputed this, and they went to the bank together, where the note was exhibited and showed the indorsements above mentioned.

November 23, 1900, appellant Mary Kelly served a written notice on Butterworth to release the mortgage in question, and tendered him the statutory fee therefor.

A few days thereafter Butterworth filed the present bill to foreclose the mortgage. The defendants answered alleging payment in full on February 1, 1899. The cause was referred to a special master to take proofs and report his conclusions. He reported that he found from the evidence that the note was not paid. Exceptions were filed to the findings of the master, overruled by the court and a decree entered for the foreclosure of the mortgage. This appeal is prosecuted to reverse that decree.

The only question for our consideration is whether the evidence warrants the finding of the special master. We hold that it does not. There is no evidence in this record in favor of appellee's claim, or tending to sustain the finding of the special master, or the decree entered by the court, except that of the appellee, Butterworth. Assuming that the burden of proving payment is upon the party alleging it, we think the testimony of Mary Kelly that on the morning in question her husband had and took with him at the time he started for the bank with Butterworth the requisite amount of money to pay the mortgage indebt-

edness; the testimony of Frank Kelly that he made the payment at the bank; the indorsement on the note; the agreement of Butterworth to have the mortgage released, and his admissions in the presence of disinterested witnesses that every cent Kelly owed him had been paid, establishes the defense of the payment of the mortgage indebtedness by a preponderance of the evidence.

The exceptions to the findings of the special master should have been sustained. The decree is erroneous, and is reversed, and the cause remanded to the Circuit Court for another hearing.

Charles W. Haish v. Marshall Field & Company.

1. **GUARANTY**.—*An Original Undertaking*.—A written instrument contained the following provision: "I further agree to pay said Marshall Field & Co. all costs, expenses and reasonable attorney's fees paid or incurred by them, in endeavoring to obtain payment for such goods and merchandise from said W. E. Hart or myself." *Held*, that any claim under this guaranty was not due at the commencement of the suit to obtain payment for goods sold and could not be included in such suit, but is collectible in a second suit on the guaranty.

Guaranty.—Common counts. Appeal from the Circuit Court of De Kalb County; the Hon. CHARLES A. BISHOP, Judge presiding. Heard in this court at the April term, 1902. Affirmed. Opinion filed July 18, 1902.

JONES & ROGERS, attorneys for appellant.

ROBERT W. WRIGHT, attorney for appellees.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This was a suit brought by appellees against appellant to recover expenses and attorney's fees incurred by appellees in a former suit between the same parties. That suit was brought by appellees upon a written guaranty executed by appellant for the payment of the prices and values of such goods and merchandise as should be sold by appellees to

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one W. E. Hart, during the time therein mentioned. The judgment therein in the court below was in favor of Haish, but on writ of error this court reversed and remanded the case. See *Marshall Field & Co. v. Haish*, 85 Ill. App. 164, where the instrument sued on is set out in full.

Upon a second trial in the court below, appellees recovered a judgment against appellant for the sum of \$305.39 and costs of suit, which amount and costs were duly paid by appellant. The written instrument above referred to contained among other things the following provision: "I further agree to pay said Marshall Field & Co. all costs, expenses and reasonable attorney's fees paid or incurred by them in endeavoring to obtain payment for such goods and merchandise from said W. E. Hart or myself," and it is upon this provision that the present suit is based. In this case a jury was waived and the trial was had before the court upon a written stipulation as to the facts. Appellees filed a bill of particulars, showing the amount claimed by them to be \$196.70. It was agreed by the parties in the stipulation, upon which the case was tried, that the suit was brought solely to recover expenses and attorneys' fees incurred in the suit, upon the guaranty above referred to, and "that such attorney's fees and expenses as shown by said bill of particular items were reasonable, and were not included in the judgment in the former suit upon such guaranty, nor offered in evidence in such suit." The court found in favor of appellees and gave judgment against appellant for \$196.70.

Appellant contends (1) that the costs, expenses and attorney's fees provided for by the written instrument were only those which might be incurred in endeavoring to obtain payment, by suit or otherwise, for the goods and merchandise in question from said Hart or from appellant, and not such costs, expenses and attorney's fees as should be incurred in bringing suit against appellant on the written guaranty; (2) that appellees should have included all demands in the first suit, and not having done so, they can not, in this suit, recover the expenses and attorney's fees incurred in that suit. By the language of the written guaranty the costs,

expenses and attorney's fees which appellant agreed to pay were those which should be incurred by appellees in endeavoring to obtain payment for the goods and merchandise sold Hart "from said W. E. Hart or myself." Appellees had sold no goods to appellant directly, and the only way in which they could obtain payment from him for such goods and merchandise as were sold to Hart, was by suing appellant upon the contract of guaranty. The plain interpretation of the contract of guaranty is that it includes such costs and expenses and reasonable attorney's fees as should be incurred in suing Hart for the value of the goods and merchandise, or in suing Haish upon the guaranty. To give the contract any other meaning would be to partially nullify the evident intention of the parties. The case of *Abbott v. Brown*, 131 Ill. 108, relied upon by appellant, is not in point here. In that case there was a guaranty indorsed upon the back of a promissory note for the payment of a note at maturity, and also to pay "all costs and expenses paid or incurred in collecting the same, including attorney's fees." The guaranty plainly included only the costs and expenses incurred in an action upon the note against the maker, and the court therefore properly held that it did not render the guarantor liable for the same in the suit upon the guaranty. This is very different from the provision of the guaranty here, which provides for the payment of such costs, etc., incurred by appellees in endeavoring to obtain payment from either Hart or Haish.

It is further obvious that the expenses and attorney's fees incurred in the former suit against appellant upon the guaranty could not have been collected in that suit because it could not have been known until the determination thereof, what such expenses would be. Further, the expense and attorney's fees which might be incurred in the suit were not due at the time the suit was brought and consequently could not have been included in the same action. *Dearlove v. Edwards*, 166 Ill. 619. A second suit was therefore necessary to recover the expenses and reasonable attorney's fees provided for by the written guaranty. The judgment of the court below will be affirmed.

Cornelius Scanlan v. John Schwab.

1. **MANDAMUS—Clear Legal Right.**—A mandamus should never be awarded except the relator has a clear legal right to have the thing sought by it done, and in the manner and by the person or body sought to be coerced. It will never be granted in a doubtful case.

2. **SAME—Requisites of Petition.**—The petition must set forth every fact necessary to show the duty of the person sought to be coerced to perform the act.

3. **SAME—Defective Petition.**—A petition which fails to state that there was no money in the treasury to pay a city warrant at the time it was issued is inadequate to entitle the petitioner to a writ of mandamus compelling the mayor to sign an interest-bearing warrant.

4. **MUNICIPAL WARRANTS—Rate of Interest Allowed by Statute.**—An act of the General Assembly in force July 1, 1901, limits the rate of interest on warrants issued by any city or village to five per cent per annum and further provides that such warrants shall not bear interest if there is money in the treasury to pay them when issued, and that in no event shall the warrants bear interest until thirty days after the date of their issue.

Petition for Mandamus.—Appeal from the Circuit Court of Whiteside County; the Hon. FRANK D. RAMSAY, Judge presiding. Heard in this court at the April term, 1902. Affirmed. Opinion filed July 18, 1902.

H. C. WARD, attorney for appellant.

C. C. McMAHON, attorney for appellee; McCALMONT & RAMSAY, of counsel.

It is a fundamental principle of the law of mandamus that the writ will never be granted in cases where, if issued, it would prove unavailing. High's Ex. Legal Rem., Sec. 14, 3d Ed.

It will never be granted in a doubtful case. People ex rel. v. Davis, 93 Ill. 133.

The relief will be withheld when, if granted, it would accomplish no useful purpose, even though it might do no harm. High's Ex. Legal Rem., Sec. 14, 3d Ed.; People v. Rice, 129 N. Y. 391.

The petition must set forth every fact necessary to show the duty of the person sought to be coerced to perform the

act. *People v. Town of Mt. Morris*, 145 Ill. 427; *Swigert v. Hamilton Co.*, 130 Ill. 538.

Counties, cities and towns are not embraced within the interest law. *City of Pekin v. Reynolds*, 31 Ill. 532.

City warrants can not draw to exceed five per cent interest; they may draw a lower rate. *Laws of 1901*, p. 321. (Warrants.)

Interest is a creature of statute; if not so authorized, it can not be recovered. *Pekin v. Reynolds*, 31 Ill. 532; *Pekin v. Reynolds*, 83 Am. Dec. 244; *Am. & Eng. Ency. of Law*, 2d Ed., Vol. 16, p. 995.

Counties can not allow interest on orders issued for current expenses. *Hall v. Jackson County*, 95 Ill. 352; *Co. of Hardin v. McFarlan*, 82 Ill. 138; *Wells v. Whittaker*, 4 Ill. App. 381.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

This is a petition for mandamus by appellant against appellee as mayor of the city of Fulton. The petition recites that the appellant did certain work for the city at a contract price; that after the work was done he presented a bill to the city council, which ordered the clerk to draw a warrant for its payment; that the clerk drew the warrant for the same with provision that it bear interest at six per cent per annum from date; that at the same meeting of the council and before the warrant was ordered it was moved, seconded and carried that the city clerk be instructed to insert a clause in all warrants making them bear interest at six per cent per annum from their date. The petition further avers that the appellee, as mayor, refused to sign the warrant and prays for a writ of mandamus to compel the mayor to sign the same. A general demurrer was interposed to the petition which was sustained by the court. The petitioner elected to stand by his petition. The court dismissed the same and gave judgment for costs, to reverse which the case is brought to this court by appeal.

A mandamus should never be awarded except the relator

has a clear legal right to have the thing sought by it done, and in a manner and by the person or body sought to be coerced. It will never be granted in a doubtful case.

The petition must set forth every fact necessary to show the duty of the person sought to be coerced to perform the act.

It is claimed by appellant that the city had a right to contract for the payment of interest at any rate not exceeding the legal rate. Even if this right is admitted there was no contract to pay six per cent interest or any other rate. An act of the General Assembly in force July 1, 1901, limits the rate of interest on warrants issued by any city or village to five per cent per annum, and further provides that such warrant shall not bear interest if there is money in the treasury to pay them when issued, and that in no event shall the warrant bear interest until thirty days after the date of its issue.

The resolution of the city council directing the clerk to insert a clause for interest at six per cent on warrants was a provision calling for the expenditure of money, and if authorized, the ayes and noes should have been taken upon its adoption as required by the statute. This should have been alleged in the petition.

The petition fails to state that there was no money in the treasury to pay the warrant at the time it was issued. The petition must be construed most strongly against the petitioner. For the reasons indicated we are of opinion that the petition was inadequate to entitle the petitioner to the relief sought and the demurrer was properly sustained. Moreover, neither the record nor the abstract contains any assignment of error and for that reason alone the judgment of the court below might be affirmed. *Ætna Life Ins. Co. v. Sanford*, 179 Ill. 310. The judgment of the Circuit Court is affirmed.

City of Fulton v. Sarah Green.

1. **SIDEWALKS—Knowledge of Person Using.**—Notwithstanding the fact that a person has knowledge that a sidewalk is out of repair, he still has the right to travel upon it, if, in so doing, and under all the circumstances, he exercises the care of a reasonably prudent person. And a person so using a sidewalk, although known to him to be defective, may recover for injuries received thereon.

Action on the Case, for personal injuries. Appeal from the Circuit Court of Whiteside County; the Hon. FRANK D. RAMSAY, Judge presiding. Heard in this court at the April term, 1902. Affirmed. Opinion filed July 18, 1902.

C. C. McMAHON, attorney for appellant.

H. C. WARD and E. M. BLODGETT, attorneys for appellee.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

This was a suit by Mrs. Sarah Green against the city of Fulton to recover compensation for injuries received from falling on a defective sidewalk. The plaintiff recovered a verdict for \$500. By requirement of the trial judge she remitted \$100 and judgment was rendered in her favor for \$400. The defendant appeals.

The plaintiff and her husband were going home from church, by the usual and most direct route, about nine o'clock at night, upon the only sidewalk on the street. The walk was of wood and one of the boards or plank tipped up. Plaintiff caught her foot under it, fell and was injured.

Plaintiff's proof tended to show the stringers were rotten and several of the boards or planks loose and that the walk had been out of repair for a considerable length of time and that the street commissioner and one alderman had been notified of its defective condition and that no steps had been taken to repair it. There was proof to the contrary upon all of these questions.

The questions whether the walk was out of repair, whether the city through its officials had actual notice thereof, and

whether the walk had been out of repair a sufficient length of time to charge the city with constructive notice, were all questions of fact for the determination of the jury.

The plaintiff was walking in the usual and ordinary manner and we find no proof in the record authorizing us to infer want of due care upon her part.

It is urged that the plaintiff had many physical ailments before this injury. Undoubtedly this is true. But that would not bar her right of recovery. Sidewalks are made for those in ill as well as good health. A woman in feeble health has equal rights thereon with an athlete. Moreover a person in the weakened condition of the plaintiff would be more likely to suffer from a fall than would a person in strong physical condition.

It is urged that the judgment should be reversed and the plaintiff denied the right of recovery because she was accustomed to pass over the walk in question, and must in consequence thereof have been acquainted with its condition. We can not give our assent to this contention. Notwithstanding the fact that a person has knowledge that a sidewalk is out of repair, he still has the right to travel upon it, if, in so doing, and under all the circumstances, he exercises the care of a reasonably prudent person. And a person so using a sidewalk, although known to him to be defective, may recover for injuries received thereon. *City of Savanna v. Trusty*, 98 Ill. App. 277; *City of Streator v. Chrisman*, 182 Ill. 215.

The testimony is conflicting. It was the special province of the jury to determine the facts. We would not be warranted in disturbing the conclusions reached by the jury. The damages awarded are not excessive. The record is free from error. The judgment of the Circuit Court will be affirmed.

Illinois Steel Company v. Stephen Delac.

1. **EXPERT TESTIMONY**—*Failure to State that Conditions Existing in Plaintiff Were Result of Injury.*—The court is not warranted in excluding testimony of physicians because they had not testified that the conditions they found existing in plaintiff resulted from the injuries received by him in the accident complained of.

Action on the Case, for personal injuries. Appeal from the Circuit Court of Will County; the Hon. ROBERT W. HILSCHER, Judge presiding. Heard in this court at the April term, 1902. Affirmed. Opinion filed July 18, 1902.

GARNSEY & KNOX and WM. DUFF HAYNIE, attorneys for appellant.

DONAHOE & McNAUGHTON and JAMES A. McKEOWN, attorneys for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

Stephen Delac, named in the pleadings Stif Delac, brought this action against the Illinois Steel Company to recover damages for injuries sustained by him on May 22, 1899, while engaged as a servant of defendant in removing a "bosh plate" from the wall of a furnace. He recovered a verdict for \$5,000, remitted \$2,500 and had judgment for \$2,500, from which defendant appeals. Plaintiff was injured at the same time and under the same circumstances detailed in the cases of Illinois Steel Co. v. McFadden, 98 Ill. App. 296, and 196 Ill. 344, and Illinois Steel Co. v. Sitar, 98 Ill. App. 300. The reports of those cases contain a description of the circumstances under which the injury was inflicted, which need not be repeated here. They also dispose of many objections appearing in the present record. The iron bar mentioned in the cases just cited was supported at the end farthest from the wall of the furnace by a cross-bar in the hands of two men, one of whom was the plaintiff here. When the bosh plate came out, accompanied with a rush of flame, plaintiff fell backward and fell off the platform, which was some seven to nine feet from the

ground, and fell upon bars and iron used around the furnace. According to the testimony of defendant's surgeon who attended plaintiff in a hospital about a month, plaintiff was burned on the right wrist, the left hand, wrist and forearm, and the left side of the face. According to plaintiff's proof he also received serious and permanent injuries in the back, and injuries upon his legs and foot, from his fall; was unable to work at all for nine months; has been able to work only part of the time since, and still suffers pain and loss of sleep. Before the injury he was earning \$65 to \$70 a month. Since he resumed work he has been able to earn but \$24 to \$26 a month. We would not be warranted in holding the judgment is excessive.

It is argued the proof in this case shows Conlon, the superintendent, ordered the blast taken off before the bosh plate came out, and therefore the event was a mere accident. One witness did so testify, but several witnesses testified Conlon's order to take off the blast was given just after the bosh plate came out, and that before that Conlon had three times ordered the men at the ball to strike, the last blow causing the removal of the bosh plate and the resulting escape of flame. It is argued the proof shows plaintiff dropped the cross-bar, and that this was what caused the bosh plate to come out, and therefore either plaintiff caused the injury by his own negligence, or else it was a pure accident. The proof, we think, is clear that it was the escaping flame when the bosh plate came out which caused plaintiff to let go of the cross-bar as he fell backward.

Plaintiff called three physicians who had examined him only one or two days before they testified, and who testified he was suffering from traumatic neurosis, and that he was permanently disabled. At the close of plaintiff's proofs, defendant moved to exclude the testimony of the three physicians because they had not testified that the condition they found existing in plaintiff resulted from the injuries received by him when the bosh plate was removed. The motion was denied and defendant excepted. One of

them, Dr. Brannon, testified that the disease, traumatic neurosis, with which he found plaintiff afflicted, might be caused by a fall from a platform six or eight feet high. Another, Dr. Higgins, testified that with the history of the case the patient gave him, he attributed a certain lack of sensation which the doctor described, to the concussion of the whole body, and of the nervous system, that plaintiff received in his falling and striking as he did. He also explained that in making such an examination the physician must rely to a certain extent upon the history of the case, given by the patient or by some one else who knows it. Each of these physicians gave numerous tests to which they subjected the patient. Dr. Curtiss testified (as did the others) that he found tenderness over the spine from the base of the skull to the lower end of the spine, much marked, making the patient flinch under pressure. Drs. Brannon and Higgins testified to means used to prevent the patient knowing to what tests he was being subjected or the object of them, and to areas in various parts of the body where there was a lack of sensation. This testimony was to be considered in connection with plaintiff's own testimony as to the injuries and swellings on his back, caused by his fall, and as to his symptoms and sensations since then, and also with the evidence given by another patient in the hospital who testified concerning the condition of plaintiff's back as he saw it while they were in the hospital in adjoining beds. We are of opinion the court would not have been warranted in excluding the testimony of these physicians. Dr. Curtiss was not asked what could have caused such a condition as he described, but we do not think it was necessary to prove that by each physician. If it was necessary, there was no separate motion to exclude his testimony, but only one motion to exclude all the testimony of all three physicians. The judgment is affirmed.

Illinois Steel Company v. David A. Downey.

1. **NEGLIGENCE—Master and Servant.**—Where an employe is injured by falling into a wheel pit, the location of which he is familiar with, his negligence will preclude a recovery for the injury.

Action on the Case, for personal injuries. Appeal from the Circuit Court of Will County; the Hon. JOHN SMALL, Judge presiding. Heard in this court at the April term, 1902. Reversed. Opinion filed July 18, 1902.

GARNSEY & KNOX and WM. DUFF HAYNIE, attorneys for appellant.

J. W. DOWNEY, attorney for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This was a suit by appellee to recover damages for personal injuries alleged to have been sustained by him while in the employ of appellant, by reason of falling into a wheel pit in an engine room belonging to the latter. The engine in the room in question was used to furnish power for the manufacture of iron rods in an adjoining room, where appellee worked as a leverman. The engine room was about 80 by 120 feet in size, the greater part of the south side being occupied by the engine. At the east end of the engine, close to the east side of the building, was the main fly wheel, and north of it, some fourteen feet, was a large wheel revolving around the main shaft, known as the pulley wheel. This wheel revolved in a large pit, which, according to appellee's testimony, was about twenty-five feet long, twelve or fourteen feet wide and some twelve to fourteen feet deep. North of the pulley wheel pit there was a door leading from the engine room into the rod mill.

About December 1, 1899, it was found necessary to shut down the rod mill on account of a defect discovered in the main driving shaft, necessitating certain repairs. The rod room being shut down, appellee was assigned to the engine room and set to work with the machinists' gang, which was in charge of one John Sweeney. On the afternoon of

December 9th, Sweeney's gang was engaged in removing bolts and dismantling the pulley wheel. There was one bolt which they could not extract and it was left for other men, known as the sailor gang, to look after, while Sweeney's men, at about 3:30 p. m., went to the main fly wheel. About an hour later Sweeney sent appellee to get a wrench which had been used at the pulley wheel. While feeling around near the door into the rod room for the wrench, as he had been directed to do by Sweeney, appellee fell into the wheel pit and received injuries for which he brought this suit.

The declaration consists of three counts. The first charges that defendant carelessly and negligently left uncovered and unprotected a certain wheel pit near where plaintiff was working, and that while plaintiff was exercising due care for his own safety, he fell into the same, and that his nervous system was shattered and he sustained a rupture, and permanent injury to his spine and eyes. The second count charges that defendant neglected to furnish a reasonably sufficient light with which to work and to enable plaintiff, and the other servants of defendant working with him, to see places of danger in the vicinity of the place where they were working. The third count combines the charges contained in the other two. The jury returned a verdict of \$3,500, and a motion for a new trial having been overruled, judgment was entered for that amount.

Appellant contends that the judgment should be reversed for the reason that the proof failed to sustain any count of the declaration. It appeared from the evidence that the wheel pit into which appellee fell was ordinarily protected by a railing, but that this railing had necessarily been removed while the repairs were being made. The sailor gang worked from thirty to forty-five minutes taking out what remained of the pulley wheel after Sweeney's men had left. Appellee claims that appellant was negligent in not causing the railing to be replaced and the wheel pit protected after the sailor gang left. The same necessity did not exist for protecting the pit while the work of dis-

mantling and repairing was going on, which existed at a time when the factory was engaged in running in its regular work. Appellee had just come out of the pulley wheel pit himself but a short time before he was sent back to find the wrench and must have known of its location, and the sailor gang had left the pit but a few minutes before. Under the circumstances it does not appear that appellant was guilty of negligence in leaving the pit unprotected for the short time which elapsed between the time when the sailor gang left it and the time when appellee fell into it, if indeed it was necessary to protect it at all while the work of repair, in which appellee was himself engaged, was going on in the engine room.

Appellee was certainly in a position to be as well informed of the location and condition of the pit as the foremen of the several gangs at work in the room, or any one else representing appellant.

Upon the question of the sufficiency of light, the proof showed the room was furnished with three arc and fifteen incandescent lights. There was some conflict in the evidence as to the number of lights which were in operation at the time of the accident, but the great preponderance of the evidence is to the effect that there was a sufficient number at the time in question to fairly light the room and to plainly indicate the location of a pit the size the pulley wheel pit is shown to have been.

We are therefore of opinion that the evidence failed to show that appellant neglected to furnish reasonably sufficient light to enable its men engaged in making repairs to prosecute their work, and by the use of ordinary care to avoid danger and injury. The judgment of the court below is accordingly reversed.

Finding of Facts to be incorporated in the judgment:

We find that the injuries of which appellee complains and on account of which this suit was brought, were not caused by the negligence of appellant.

Emma M. Over, Adm'x, v. Frank W. Walzer.

1. **CONTRACTS**—*Matter Omitted from Written Contracts.*—A contract can not be part in writing and part in parol. If there has been some agreement omitted by mistake from the written contract, the only remedy is to secure a reformation of the instrument, and such reformation can not be secured in an action at law.

Assumpsit.—Appeal from the Circuit Court of Whiteside County; the Hon. FRANK D. RAMSAY, Judge presiding. Heard in this court at the April term, 1902. Reversed. Opinion filed July 18, 1902.

F. E. ANDREWS, attorney for appellant.

C. L. SHELDON, attorney for appellee.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

Mrs. Caroline S. Smith and Frank W. Walzer, on February 1, 1900, entered into a written contract under seal, which is the basis of this suit by Walzer against the administratrix of the estate of the said Caroline S. Smith, now deceased. In a certain chancery case in Whiteside county certain lands had been sold by the master and purchased by Mrs. Smith and a certificate of purchase was issued to her January 25, 1900.

The contract in question provided that Walzer should pay Mrs. Smith \$1,000 in cash and \$12,200 March 1, 1900, and pay all taxes that might be levied on the land after the year 1899, and that upon his completing the payment of \$13,200 on March 1, 1900, Mrs. Smith should assign the certificate of purchase to Walzer and he was then to have immediate possession of the premises.

Walzer paid the money, Mrs. Smith assigned and delivered to him the certificate and caused her tenant then in possession of the premises to attorn to him. A lease was then executed between Walzer and the tenant to the premises in question.

Afterward one John G. Plumley brought ejectment against Walzer and his tenant and recovered judgment of

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ouster. Walzer took a new trial under the statute, and while the case was pending in the fall of 1900, settled with Plumley, and asserts in his brief, bought Plumley's outstanding title, on paying, according to Walzer's contention, the then owner of the equity of redemption. The period of redemption expired April 25, 1901. Mrs. Smith had died in the meantime and Walzer brought this suit against her administratrix, claiming the right to recover all that he had paid Plumley for the purchase of the equity of redemption.

The court below, by its rulings upon the evidence and instructions, held that this was not a proper measure of damages and refused to permit Walzer to prove what he paid Plumley, but permitted him to recover a verdict and judgment for the fair rental value of the premises from the time he purchased Plumley's equity of redemption in the fall of 1900, to the expiration of the period of redemption, April 25, 1901. The amount of the judgment is \$392.40. The defendant appeals.

To sustain this suit at law it must appear Mrs. Smith warranted to Walzer the peaceable and quiet enjoyment of the premises from the date of the transfer of the certificate of purchase until the expiration of the period of redemption; and that appellee was evicted from said premises during that period, or that he was subjected to suit for possession by one entitled to evict him and was obliged to purchase the premises from said party, and the amount lost by being deprived of the right of possession warranted to him.

The contract between the parties is in writing. It is not ambiguous. Its provisions are clear and unequivocal. It contains no covenant of warranty.

All that Mrs. Smith thereby agreed to do for the \$13,200 was to assign to him the certificate of purchase and surrender the possession of the premises to him at the time designated. She did both. She fully complied with the requirements of the contract. She kept every obligation which it imposed upon her. The plaintiff is not entitled

to a judgment for damages against her estate because of the fact that he was unable to retain the possession during the period of redemption.

It is argued by counsel for appellee that there are circumstances in evidence tending to show that Mrs. Smith intended to warrant the possession of the premises to Walzer. This contention can not avail in an action at law. The contract is in writing. A contract can not be part in writing and part in parol. If there were an agreement that Mrs. Smith should warrant the possession and that agreement was by mistake omitted from the written contract, Walzer's only remedy would be to secure a reformation of the instrument in a court of equity. He can not secure that reformation in an action at law.

The view we take of the case, striking as it does at the very right of the plaintiff to recover, renders it unnecessary to review the rulings of the court upon the evidence and instructions. The judgment of the Circuit Court will be reversed.

Wilhelmina Deuterman v. Minnie Ruppel.

1. DEPOSITIONS—*In Support of Claims Against Estates.*—In taking a deposition in support of a claim filed against an estate, it is not necessary to notify every person who has an ultimate interest in the distribution of the property. It is sufficient to notify the executor and any other person who may have appeared to resist the claim. The executor as to the personal estate represents all parties in interest, unless such other parties in interest have personally appeared.

2. SAME—*Subsequent Parties Bound by Prior Depositions.*—One who on his own application is allowed to appear after depositions have been taken, is bound by the depositions already taken, although he is entitled to further cross-examine witnesses whose depositions have been taken, if he applies for that permission.

3. ADMISSIONS—*Of Deceased Persons.*—The admissions of a deceased testatrix that she had money belonging to others, and the fact that she enjoined upon her friends to see that they received this money from her estate, are competent to bind her, and to bind those who took under her will, or who would otherwise be entitled to inherit from her.

Deuterman v. Ruppel.

Appeal from Order of Probate Court.—Appeal from the Circuit Court of LaSalle County; the Hon. CHARLES BLANCHARD, Judge presiding. Heard in this court at the April term, 1902. Affirmed. Opinion filed July 18, 1902.

FRED T. BEERS, attorneys for appellant.

D. B. SNOW, attorney for appellee; D. C. TAYLOR, of counsel.

MR. JUSTICE DIBELL delivered the opinion of the court.

Mrs. Minnie Ruppel filed a claim against the estate of Elizabeth Schneider, deceased, in the Probate Court of LaSalle County. The claim was there contested by the executor, and upon a trial it was allowed in the sum of \$2,000, as of the sixth class. Thereupon one claiming to be a residuary legatee under the will of Elizabeth Schneider appeared, and prayed for and perfected an appeal to the Circuit Court. She is named Hermina Deuterman in the appeal bond from the Probate Court, and Wilhelmina Deuterman in the appeal bond from the Circuit Court. At the close of the plaintiff's proofs in the Circuit Court, Mrs. Deuterman asked the court to instruct the jury to find no cause of action. This was denied. The defendant offered no testimony. Thereupon the court at the request of claimant gave an instruction directing the jury to find for claimant in the sum of \$2,000. Such a verdict was returned. Motions by Mrs. Deuterman for a new trial and in arrest of judgment were denied. Judgment was then rendered against the estate for the payment of said claim as of the sixth class, in the due course of administration, in the sum of \$2,000. The costs were adjudged against Mrs. Deuterman. She appeals.

Appellant argues the Probate Court did not have jurisdiction of this claim, and that it could only be established by a bill in equity. The claim is based upon these alleged facts: that Michael Schneider died leaving a last will, by which, after disposing of his real estate, and two legacies of \$5 each, he gave \$2,000 to his wife, Elizabeth Schneider, for her use and benefit during her natural life, and at her

death said \$2,000 to go in equal parts to John Newberg, Jr., and Minnie Newberg, the children of his brother-in-law, John Newberg, Sr., of St. Louis county, Missouri; and in said will he directed that at the death of his wife said \$2,000 be paid to said John and Minnie, and that in case of the death of either one of them without issue surviving, then said \$2,000 be paid to the other one of said children, further provision being made for the distribution of said \$2,000, if both John and Minnie died without issue before his wife, Elizabeth; that by said will he bequeathed the rest of his personalty to his wife, Elizabeth, and appointed her sole executrix; that Michael Schneider died possessed of an estate; that said will was admitted to probate in the County Court of Bureau County, Illinois, wherein Michael Schneider resided; that no letters testamentary or of administration were ever taken out, but said estate passed into the hands of Elizabeth Schneider without administration; that she received more than \$2,000 from his estate, and that at her death she left more than \$2,000 in cash, and more than that sum in good outstanding notes, and real estate worth more than \$2,000, so that at her death she had on hand abundant funds to answer said claim; that John Newberg, Jr., died without issue before Elizabeth Schneider; and that Mrs. Minnie Ruppel, the claimant, is the Minnie Newberg named in said will.

In our judgment the facts so alleged, if proved, establish a money demand in favor of Mrs. Ruppel against the estate of Elizabeth Schneider of the sixth class, as provided by section 70 of the administration act, which covers cases "where the decedent has received money in trust for any purpose." If the facts alleged are proved, Mrs. Schneider received \$2,000 in trust, for her own use and benefit during life, and to pay the principal sum at her death to John Newberg and Minnie Newberg, or to the survivor, if one of them died without issue before Elizabeth Schneider. The court therefore properly denied appellant's motion to dismiss the claim for want of jurisdiction.

Before the trial in the County Court claimant took dep-

Deuterman v. Ruppel.

ositions in Missouri. After the appeal to the Circuit Court claimant took a deposition at Princeton, Illinois, and took depositions at Peru, Illinois. Appellant argues that she moved to suppress these depositions, that the court denied such motion, and erred in so doing. None of these matters are embodied in the bill of exceptions in this cause, and therefore they are not presented by this record for our decision. The depositions themselves appear in the bill of exceptions where offered in evidence, together with certain objections then interposed, and the ruling of the court thereon. The clerk has also set out the depositions *in extenso* in the transcript prepared by him, together with alleged motions in writing by appellant to suppress them, and written points upon said motions, and an affidavit against and an affidavit in support of said depositions, the denial of said motions, and appellant's exceptions to those rulings. It is not the province of the clerk to certify to such matters. That can only be done by the presiding judge in a bill of exceptions.

We have, however, considered the motions embodied by the clerk in his record. The only ground alleged for suppressing the Missouri depositions is that they were taken upon a stipulation between claimant and the executor, and without notice to appellant. Appellant had not then appeared in the case. We can not accede to the proposition that a residuary legatee who first appears in resistance to a claim after it has been allowed in the Probate Court, and appeals from that order, thereby destroys depositions previously taken in compliance with the law. In taking a deposition in support of a claim filed against an estate, it is not necessary to notify every person who has an ultimate interest in the distribution of the property. It is sufficient to notify the executor and any other person who may have appeared to resist the claim. The executor, as to the personal estate, represents all parties in interest, unless such other parties in interest have personally appeared. One who is not a necessary party to a suit, but who on his own application is allowed to appear after dep-

ositions have been taken, is bound by the depositions already taken, although he is entitled to further cross-examine witnesses whose depositions have been taken, if he applies for that permission. *Bruner v. Battell*, 83 Ill. 317; *Kingman v. Higgins*, 100 Ill. 319; *Whittaker v. Whittaker*, 151 Ill. 266. As appellant was not a necessary party to this proceeding but was allowed to come in at her own request after the Missouri depositions were taken, and as she did not ask leave to further cross-examine said witnesses, who were cross-examined by the executor so far as he thought necessary, we are of opinion she has no ground to complain that the court did not suppress the Missouri depositions. Again, the sole object of the Missouri depositions was to prove that claimant is the Minnie Newberg named in the will of Michael Schneider, and that her brother John died without issue before Elizabeth Schneider's death; and appellant's briefs practically concede this to be the fact. The motion to quash the Princeton deposition is based upon the ground that it was returned to the clerk of the Probate Court instead of being returned to the clerk of the Circuit Court. The probate clerk filed it, and then discovering his mistake, erased his file mark, and handed the deposition to the circuit clerk. It is not claimed that it was in any way tampered with or that appellant was injured by this mistake. Moreover, the fact sought to be proved by said deposition, namely, that an examination of the records of the office of the clerk of the County Court of Bureau County did not disclose the issue of any letters testamentary or of administration upon the estate of Michael Schneider, deceased, and that no administration of said estate could be found in the records of said court, was also proven by the oral testimony of F. E. Hoberg, who made a personal examination of said records, and testified to that effect; and the lack of administration is not denied. Appellant was therefore not harmed by the refusal to suppress that deposition. The motion to suppress the Peru depositions was based upon the ground that no affidavit for said depositions was filed with the clerk of the Circuit Court,

and no *dedimus* to take the same was issued by said clerk. Said depositions were taken before a stenographer as commissioner. The certificate of the commissioner shows that they were taken before said commissioner by agreement of the parties, that the oaths were administered by a notary public, and that the signatures of the witnesses were waived. Appellant's attorney was present, and the depositions were preceded by a stipulation between counsel for claimant and for appellant. It is not signed, and was evidently dictated to the stenographer. Appellant in her motions to suppress, and in her objections at the trial, and in her briefs here, relies upon said stipulation, so that it is evidently binding upon the parties, though not signed. It waived objection for want of notice, and agreed that all objections as to form or substance by appellant might be reserved to the hearing and considered by the court as if the witness had testified in open court and the objections had then been interposed. The depositions having been so taken by the consent and agreement of the parties, and under such stipulation, we are of opinion appellant can not now be heard to say that an affidavit should have been filed and a *dedimus* issued, as if no agreement had been made. *Pickard v. Bates*, 38 Ill. 40. The objections reserved were only such as could have been considered if the witness had testified in open court. Appellant also, according to the clerk's transcript before referred to, filed a motion to suppress each question and each answer in each of the Peru depositions on seven grounds alleged, which were, in substance, that the questions and answers were incompetent, that the answers were hearsay, that the questions called for secondary evidence for which no foundation had been laid, and were leading and suggestive, and the answers not responsive. These objections, so far as relied upon, were renewed at the trial, and will be discussed in that connection. No reversible error was committed in overruling the motion to suppress the Peru depositions, if that motion had been properly preserved in the bill of exceptions.

At the trial claimant offered in evidence a copy of the

will of Michael Schneider, with two certificates attached, the first of which was entitled, "In the County Court of Bureau County, of the July term, 1896," signed by the clerk of that court, and the body of said certificate was as follows:

"The foregoing instrument in writing was duly admitted to probate as and for the last will and testament of the within named Michael Schneider, deceased, this 27th day of July, A. D. 1886, in the County Court of said Bureau County."

The second certificate was by the county clerk of said county, under his official seal, dated the 31st day of October, A. D. 1899, and certified "that the annexed instrument in writing is a true copy of the last will and testament of Michael Schneider, deceased, as proven and admitted to record in said court on the 27th day of July, A. D. 1886, as appears from the records of said court in my office." It is argued the court erred in admitting this evidence, because not accompanied by the order of the County Court admitting said will to probate. It is a sufficient answer to say no such objection was made, and if it had been it could have been overcome by presenting the order of probate. This precise question was presented and ruled adversely to appellant's contention here, in *Calumet, etc., Dock Co. v. Morawetz*, 195 Ill. 398, except that the certificate to the will in that case did not state that it had been admitted to probate as appeared from the records in the office of the certifying clerk, as is stated in the certificates attached to the will here in question. The objection interposed when the will of Michael Schneider was offered was only that the evidence was incompetent. This could not be understood to mean that the objector claimed a proper foundation had not been laid, or that the will was not accompanied by an order admitting it to probate, but only that the will of Michael Schneider was not competent evidence to establish a claim against the estate of Elizabeth Schneider. Evidently it was competent as one of the items in the chain of evidence tending to establish that Elizabeth Schneider received \$2,000, the principal of which she was bound to hold in trust for

John and Minnie Newberg and the survivor of them, Mrs. Ruppel. The objection to the competency of the instrument was properly overruled and no other objection was made. This will was offered in evidence immediately after the opening statements by counsel for the respective parties, and appellant has seen fit to embody those statements in the bill of exceptions. From those statements it appears that appellant's attorney stated to the jury that her contention in the matter was that Elizabeth Schneider "never received the money that Michael Schneider directed should be paid over to these children," and also that appellant's attorney said in the last sentence he uttered before this will was offered, "unless you are satisfied in your own minds that Elizabeth Schneider did actually receive this money that Michael Schneider directed in his will a great many years ago she should have the use of, then it will be your duty to find against the Ruppel claim." This statement so preserved by appellant in her record directly following appellee's statement to the jury of the contents of the will, amounted to an admission by appellant that Michael Schneider did make a will in favor of appellee as here claimed.

The witnesses whose depositions were taken at Peru were Germans; many of them were but slightly acquainted with the English language, and they used uncouth and ungrammatical expressions. Claimant's counsel, in order to make the meaning of the witnesses clear, sometimes asked questions leading and suggestive in their character. We are unable to see that any substantial harm was done appellant, or that any witness was led to say anything he or she did not intend. Appellant's counsel was present, and if any witness had made a statement not intended, he could have shown that fact by cross-examination. If the court might properly have sustained objections to a few of the questions as leading and suggestive, still appellant was not harmed, for this further reason; nothing in the answer so obtained misled the jury, for they did not decide the case upon the evidence, but were directed by the trial judge to render the verdict which they did. Moreover, in a case

like this, where the witnesses seem to have difficulty in expressing themselves in correct English, the use of interrogatories that are in a measure leading is sometimes necessary and proper. Eliminating all testimony elicited by any question of a leading or suggestive character, and an examination of all the depositions taken at Peru shows that it was proved by proper and competent evidence that Michael Schneider was possessed of a considerable personal estate, consisting largely of money loaned out; that his wife received from his estate at his death a sum largely in excess of \$2,000; that she repeatedly admitted that she had received \$2,000 from his estate, which at her death belonged to John and Minnie Newberg; that she derived her property not from her first husband, but from Michael Schneider; that in the closing weeks of her life she repeatedly told her friends that she had \$2,000 that belonged to John and Minnie Newberg at her death, and enjoined upon them to see that the Newberg children received this money from her estate. This testimony as to her admissions and declarations was competent to bind her, and to bind those who took under her will, or who would otherwise be entitled to inherit from her. It is true John Newberg, Jr., was dead before she made these statements, but she evidently did not know that fact. The competent testimony permitted no other decision than the allowance of the claim in full. Appellant did not seek to controvert any of this proof. The jury could not have rendered any other verdict. The court properly directed the verdict. Appellee's claim, as filed, asked also for interest on the \$2,000 from the date of the death of Elizabeth Schneider. Both the probate and circuit courts rejected the claim for interest, and no cross-errors have been assigned.

Appellee has moved for an allowance of damages in this court on the ground that the appeal was taken for delay. We are not satisfied that the appeal was prosecuted merely for delay, and that motion will therefore be denied. The judgment is affirmed.

Thomas Haskins v. John Martin, Adm'r.

1. **ADMINISTRATION OF ESTATES—Administrator Charged with Interest.**—Sec. 114 of the administration act requires that the administrator shall be charged with interest at the rate of ten per cent per annum on the balance in his hands as such administrator from the period of two years and six months after the issuance to him of the letters of administration, unless good cause is shown why he should not be charged.

2. **SAME—Burden upon Administrator to Show Excuse for Not Distributing Estate.**—The burden of showing an excuse for not making a distribution within the legal time is cast upon the administrator.

3. **SAME—Duty of Administrator to Distribute.**—After the time for presenting claims has expired and the administrator has filed a report showing a cash balance in his hands belonging to the heirs of decedent, he should apply for an order of distribution. It is part of his duty to do so.

Appeal from an Order of the Probate Court.—Appeal from the Circuit Court of La Salle County; the Hon CHARLES BLANCHARD, Judge presiding. Heard in this court at the April term, 1902. Reversed and remanded with directions. Opinion filed July 18, 1902.

EDWARD J. KELLY, attorney for appellants.

DUNCAN & DOYLE, attorneys for appellee.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

Margaret Haskins died in the city of La Salle, intestate, May 8, 1893, leaving her surviving, Thomas Haskins, her husband, and Olga Emma Haskins, a minor, her only child and heir at law. John Martin, appellee, was appointed administrator of her estate on his petition as a creditor, January 8, 1894, and thereupon qualified and entered upon the duties of his trust. Thomas Haskins was appointed guardian of the estate of the minor, Olga Emma Haskins, July 8, 1899.

The litigated question is, whether the administrator shall be charged with interest at the rate of ten per cent per annum on the balance in his hands as such administrator from the period of two years and six months after the issuance to him of the letters of administration.

Sec. 114 of the administration act requires that he should be so charged unless good cause is shown why he should not be charged. The administrator did not file an inventory until more than two years after his appointment. At the end of two years he filed an account, and more than a year later a second account.

July 8, 1899, Thomas Haskins began this proceeding by a petition in the Probate Court in his own right as husband of decedent and as guardian of the minor heir, to require the administrator to make distribution, and prayed that the administrator might be required to pay interest according to the statute. It appears that when the administrator filed his first report he had in cash all the assets of the estate of the deceased, namely, a balance of \$829.96, except that he held in addition thereto an uncollected note. On a hearing of this case, the Probate Court found that said note had always been collectible and that the administrator had failed to perform his duty in not sooner collecting it, and ordered that he be charged with the note and interest thereon, and that he become the owner of the note. The Probate Court, however, denied the application to charge the administrator ten per cent interest. On appeal to the Circuit Court that order was confirmed. In the meantime the administrator had distributed the estate. The husband and guardian prosecutes this further appeal.

The question is whether the administrator has shown good cause why he should not be charged with ten per cent interest. The proof shows that he deposited this money to the credit of his firm the same as other money belonging to the firm, and it thereafter remained in the firm business. The firm was always ready to let him take it out whenever he wished to use it.

Two defenses are interposed: First, that a demand to make a settlement was necessary; second, that Olga Emma Haskins was an infant and had no guardian to whom the money could be paid until the date these proceedings were instituted. Neither of these defenses constitute a legal excuse for the failure of the administrator to make a distribution of the estate in the time prescribed by the statute.

The burden of showing an excuse for not making the distribution within the legal time is cast upon the administrator. It is manifest there was no legal impediment to prevent the administrator from having paid Thomas Haskins his distributive share, he being an adult. In *Estate of Schofield*, 99 Ill. 513, which was a proceeding against an administrator to account for interest on moneys received by him during the time the estate remained unsettled as well as to pay the penalty for a failure to settle the estate in due time, the court said :

“The Circuit Court charged the administrator with interest, at ten per cent, on all moneys that he retained in his hands after the expiration of two years and six months from the date of his letters, and in our judgment this was correct. At the time the second account was rendered, no debts remained unpaid, and no reason appears why the administrator did not procure an order of distribution, under which he could pay out the money then in his hands. After making the second report, no reason existed for retaining the assets of the estate in his hands, and as he did so in disregard of his plain duty, we think the court did right in charging him with interest, as required by the statute.”

After the time for presenting claims had expired and the administrator filed a report showing a cash balance in his hands belonging to the heirs of decedent he should have applied for an order of distribution. It was a part of his duty to do so.

We are of the opinion that the second defense, namely, that no guardian had been appointed for the minor heir to whom payment could be made upon order of distribution, is equally untenable. He should have applied for and obtained an order for distribution. If he had done so and paid the adult, the matter would then have been brought to the attention of the court and a guardian would then undoubtedly have been appointed. In view of the great volume of business thrust upon our probate courts and the large number of estates requiring their attention it is not expected that the times for making final settlements or the necessity for the appointment of guardians incident thereto

should be kept constantly in mind by the presiding judge. The practice in that respect and the law applicable thereto is well stated in *Rowland v. Isaacs*, 15 Conn. 122, which was a suit upon an administrator's bond for failure to perform his duties. The court said :

"It is said no order was ever made by the court of probate for the distribution of this balance, or the payment of it to the heirs. But it does not appear that the administrator ever requested the court to make any such order. It is not usual for our courts of probate to make orders in relation to the settlement of an estate, unless requested by the proper person. It was the duty of the administrator, in this case, to apply to the court for all such orders as he found necessary to close the settlement of the estate. *Warren v. Powers*, 5 Conn. Rep. 383. And the defendant can not avail himself, in his defense, of any neglect of duty on the part of the administrator.

It is further said, that during a part of the time, since the property of the deceased came into the possession of the administrator, the heirs were minors, and had no guardian; and that no demand was ever made upon him for the balance belonging to them.

The question is not whether the omission to pay the heirs, under such circumstances, would constitute a breach of the condition of the bond, but whether, after there has been such a breach, and the plaintiff's right to recover damages established, those circumstances would justify the defendant in still retaining that balance. We can see no reason why they should have that effect."

The order of the court below is therefore reversed, so far as relates to charging the administrator with interest, and the cause remanded, and the court is directed to charge him with interest at the rate of ten per cent per annum on \$829.96 from July 8, 1896, until distribution was made. Reversed and remanded with directions.

M. F. Freehill v. John Hueni.

1. *TROVER*—*When Demand is Unnecessary*.—Where a party has put it out of his power to comply with the demand, so that it must be unavailing, demand is not necessary to enable one to maintain trover.

2. *SAME*—*Object of Demand*.—The object of a demand upon one

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whose original possession was rightful is that he may have an opportunity to surrender the property and avoid costs.

3. PRACTICE—*Matter of Defense Put in Evidence upon Plaintiff's Cross-examination.*—It is error for the court to allow the defendant, over plaintiff's objection, to offer defensive matter while being cross-examined as a witness for plaintiff.

TROVER.—Appeal from the Circuit Court of Livingston County; the Hon. GEORGE W. PATTON, Judge presiding. Heard in this court at the April term, 1902. Reversed and remanded. Opinion filed July 18, 1902.

A. C. NORTON, attorney for appellant.

R. S. McILDUFF, attorney for appellee; STEVENS R. BAKER, of counsel.

MR. JUSTICE DIBELL delivered the opinion of the court.

This was an action brought by M. F. Freehill against John Hueni, in which plaintiff appeals from a judgment against him for costs. The pleadings are confused, but we deem it sufficient to say the case was tried by both parties upon the theory that two counts in trover were restored to the declaration by the withdrawal of counts in trespass, after a demurrer had been sustained to the entire declaration for a misjoinder of counts. Pleas to one of the counts in trespass went out of the record when that count was withdrawn. After the counts in trover were so restored it was by agreement ordered, "that all pleas, including statute of limitations and replication thereto, be considered in." Plaintiff can not be heard to say the court erred in sustaining the demurrer to the declaration, after he had withdrawn part of the counts and the rest have been treated as restored, and trial has been had upon them. The question whether the court erred in refusing plaintiff leave to file two additional counts on the eve of trial is not presented by this record, for such counts and the denial of the motion and an exception by plaintiff thereto, are not preserved in the bill of exceptions. The clerk's effort to certify to these matters and to preserve the proposed additional counts in his record, is unavailing. That could only be done by the trial judge in a bill of exceptions.

Defendant was a warehouseman at the village of Risk. Plaintiff was a farmer, and in August, 1894, stored with defendant 880 bushels of oats, for which defendant issued a warehouse receipt, the body of which was as follows :

“ Received of Michael Freehill, Bu. 880 of white oats in store at owner's risk of fire or other damage, storage free to October 1, 1894, afterward it will be one-half cent per bushel a month.”

Plaintiff charges defendant with the conversion of these oats. Under the law prevailing in this state defendant was not required to keep in store the identical grain deposited by plaintiff but was required to always have on hand oats of like quality and quantity. Section 25 of the act of 1871 for the regulation of public warehouses makes it a crime for any warehouseman of any public warehouse to “ remove any property from store (except to preserve it from fire or other sudden danger) without the return and cancellation of any and all outstanding receipts that may have been issued to represent such property.” Defendant was also under contract to keep the oats in store for the agreed compensation of one-half cent per bushel each month, beginning October 1, 1894. Public statute and private contract each made it defendant's duty to have always in store oats of the quality and quantity required to meet his outstanding warehouse receipts. If he violated that duty to plaintiff he was guilty of a conversion.

Plaintiff testified that in February, 1895, he noticed the oats were all shipped out of defendant's bins, and that on July 25, 1895, in the presence of his son John, he asked defendant where his oats were, and defendant replied, “ I haven't them now.” John Freehill testified he was present at that conversation; that plaintiff said to defendant, “ John, I want my oats;” and that defendant replied, “ I haven't got your oats.” Plaintiff further testified that after the conversation just referred to, and on the same day, he looked in defendant's bins and could see them clear to the bottom, and there were no oats there. He also testified that between February and July, 1895, he had several

times noticed defendant had no oats on hand. Plaintiff further testified that on July 25, 1895, oats were worth thirty cents and over per bushel at Risk. On cross-examination he said he did not know just what they were worth then. Plaintiff called defendant as a witness, and inquired what oats were worth at Risk at the time he shipped out the identical oats he received of plaintiff, and also at a later date, and he replied that plaintiff told him they were worth thirty-three cents, and that it was so long ago he, defendant, could not remember just the price. The fair inference from defendant's testimony was that he thought thirty-three cents was about the price. The storage on July 25, 1895, could not have exceeded five cents per bushel. Plaintiff therefore presented proof tending to show defendant had shipped out all the oats, and had none whatever on hand to meet plaintiff's warehouse receipt in February, 1895, and on July 25, 1895, and between those dates, and was guilty of a conversion prior to the last-named date, and offered proof from which the jury could estimate the damages after deducting the storage. Plaintiff did not have the warehouse receipt in his possession when the trial began, but supposed it to be lost. He showed it was in the hands of his attorney at the trial of a former law suit and could not afterward be found. He then proved a copy and offered it. Thereupon defendant's counsel produced the original, and it went in evidence. The record does not show where defendant's counsel got it nor how long he had it; but it was unassigned, and defendant did not claim it belonged to him, or that he had ever honored it in the hands of any one else, or that any one ever owned it except plaintiff. There was therefore proof tending to show a conversion of the oats by defendant prior to July 25, 1895, and that plaintiff owned the receipt, and therefore owned the oats when they were converted, and evidence from which the jury could have computed the damages after deducting the storage charges earned prior to the conversion. If there was an actual conversion by shipping out the oats in store, so that defendant did not

have in store the oats to fill his outstanding warehouse receipts, then no demand was necessary. The object of a demand upon one whose original possession was rightful is that he may have an opportunity to surrender the property and avoid costs. But if he has put it out of his power to comply with the demand, so that the demand must be unavailing, demand is not necessary to enable a party to maintain trover. *Tomkins v. Haile*, 3 Wend. 406; *Riford v. Montgomery*, 7 Vt. 411; *Jones v. Dugan*, 1 McCord, 266; *Himes v. McKinney*, 3 Mo. 382; 1 Chitty's Pl. 157, note.

In this state of the record, the court committed two errors for which we conclude the judgment must be reversed and a new trial awarded. Plaintiff called defendant and made him his own witness to prove that the warehouse receipt was in his handwriting and that he issued it, and when he issued it, and that he kept on hand the identical oats delivered to him by plaintiff but a very short time and then shipped them out, and what oats were worth at Risk at certain dates. On cross-examination the court, over plaintiff's objections that this was not proper cross-examination, permitted defendant to testify that, from the date these oats were delivered to him by plaintiff down to the day he testified, he had always had on hand enough oats of the same quality to answer plaintiff's warehouse receipt, and also to cover all other oats left with him in store. This was not germane to the direct examination, and was matter of defense, and defendant should not have been allowed to put this defense in evidence in plaintiff's proofs under the guise of a cross-examination. But with this proof in, when plaintiff rested there was the evidence of plaintiff and defendant counter to each other as to whether defendant did have oats in store in February, 1895, and on July 25, 1895, and between those dates; and the evidence of plaintiff and his son that on July 25, 1895, defendant said he did not have plaintiff's oats, which conversation defendant did not deny. It is evident neither party expected the identical oats would be retained, and when defendant said to plaintiff on July 25, 1895, "I haven't

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got your oats," the natural conclusion would be he meant he had no oats wherewith to fill plaintiff's receipt, thus corroborating plaintiff's testimony that immediately after that conversation, on the same day, he examined defendant's bins and found no oats in them. Obviously it was for the jury to decide whom to believe. The court improperly withdrew this question of fact from them by excluding the testimony and directing a verdict for plaintiff.

But it is argued this course was warranted by the oral plea of the five years' statute of limitations. It is said the counts in trover are to be treated as refiled on the day they were restored as above stated, which was November 21, 1901, more than five years after July 25, 1895. The issue of a summons is the commencement of an action at law. It is *lis pendens* from that date. The summons is not in the record before us, but the declaration was filed January 6, 1900. We must assume the suit was begun on or prior to that date. If the declaration had been filed when no suit had been begun we must assume defendant would not have pleaded to it, but would have moved to strike it from the files. The original declaration stated the cause of action here relied upon, and no matter what amendments or changes may have been made, if the same cause of action is stated the running of the statute of limitations is arrested by the commencement of the suit. Both dates concerning which the proof above stated was introduced were less than five years before the declaration was filed.

Proof was introduced of matters occurring in 1900, but we deem it unnecessary to discuss it, for the reason that whether or not what then happened would establish a cause of action, the proof offered of a conversation discovered in February and July, 1895, would give plaintiff a cause of action, if the jury believed it. The judgment is reversed and the cause remanded.

The Village of Barrington v. Flora B. Meyer.

1. *PRACTICE—Measure of Damages.*—A proposition which states that if plaintiff's property sustained material damages from the raising of the grade, she was entitled to recover; that she should recover whatever amount the market value of said property was depreciated, by reason of the raising of the street; that in determining what, if any, damages the property sustained, it was proper to show the fair market value of the same before and after the street was raised, is correct as applied to the facts in this case.

2. *INSTRUCTIONS—Changing Grade of Street.*—An instruction which states that a city has a right to lower or elevate the grade of its streets, with the view of fitting them for use as streets, and that lot owners can not recover damages for any injuries which may ensue, is properly refused.

Trespass on the Case, for damages caused by changing the grade of a street. Appeal from the Circuit Court of Lake County; the Hon. CHARLES H. DONNELLY, Judge presiding. Heard in this court at the April term, 1902. Affirmed. Opinion filed July 18, 1902.

FRANK ROBERTSON, attorney for appellant.

COOKE & UPTON, attorneys for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This was an action in case commenced November 1, 1895, by appellee against the village of Barrington, to recover damages for injuries claimed to have been caused by the raising of the grade of Main street in said village in 1893, in front of premises owned by her.

The original declaration, as amended, charged that prior to the elevation of the grade there was direct and convenient access to and communication between the premises of appellee and said Main street, which was of great benefit to the premises, and that by reason of the raising of the grade of said street the free and easy access to and from appellee's premises, and the direct communication between said premises and Main street, had been entirely destroyed and cut off; that by reason of said grievances appellee's premises had been greatly damaged, etc. Pleas of the gen-

eral issue and the statute of limitations were filed. A jury was waived and the trial judge viewed the premises. After the evidence was all in, the court, over objections by appellant, permitted appellee to file an additional count to her declaration.

The additional count charged that by reason of the change in the grade, appellee had been deprived of the lawful, accustomed and legitimate use and enjoyment of her premises and that the same had been greatly injured and depreciated in value. To this count, pleas of the general issue and statute of limitations were also filed.

The court found for appellee and gave judgment in her favor for \$500. Complaint is made that the trial court erred in holding certain propositions of law submitted by appellee, and in refusing two of those submitted by appellant; that the evidence did not prove a cause of action and that there was error in permitting appellee to file the additional count.

The propositions of law held for appellee of which appellant complains, stated that if appellee's property sustained material damages from the raising of the grade, she was entitled to recover; that she should recover whatever amount the market value of said property was depreciated by reason of the raising of the street; that in determining what, if any, damages the property sustained, it was proper to show the fair market value of the same before and after the street was raised. The evidence introduced related to such damages as caused actual injury to the use and enjoyment of the property. Appellee neither claimed in her declaration nor sought to show any damages of a different character. We think the propositions of law offered by and given for appellee, as applied to the facts in the case, were correct, as showing what constituted a cause of action and the manner of determining the measure of damages.

There was a proposition of law held by the court for appellee, in reference to the effect upon the case of the view of the premises by the trial judge, which seems to be in conflict with the case of *Vane v. City of Evanston*, 150 Ill.

616. The question of the correctness of this proposition was not argued, however, by appellant in his original brief and therefore will not be considered by us here. *Schumacher v. Bell*, 164 Ill. 181; *B. & L. Ass'n v. Ayers*, 71 Ill. App. 529.

The propositions refused for appellant, of which it complains, state in effect that a city has a right to lower or elevate the grade of its streets, with the view of fitting them for use as streets, and that lot owners can not recover damages for any injuries which may ensue. These instructions did not state the law correctly and were properly refused. *City of Bloomington v. Pollock*, 141 Ill. 346.

There was abundant evidence to show that appellee's premises had been damaged by the change of grade in the street and that the amount allowed by the court was not excessive. Appellant's claim that there was a variance between the proofs and the original count of the declaration, as amended, is not sustained by the record. One of the charges in that count was, that free and easy access to and from appellee's premises and Main street, had been destroyed and cut off. Proof was introduced by appellee, however, tending directly to prove this charge of the declaration. Appellant also contends that a recovery under the additional count of the declaration, which was filed after the evidence was in, was barred by the statute of limitations. It is true that the injuries complained of occurred more than five years prior to the time the additional count was filed. This count, however, stated no new cause of action, but merely restated the same cause of action, setting out the damages resulting therefrom in a different manner. Such being the case, the statute of limitations did not apply to the additional count and there was no error in permitting it to be filed.

The judgment of the court below will be affirmed.

Rock Island & Peoria Ry. Co. v. Stephen Dormady.

1. **RAILROADS—Switching in Freight Yards.**—Railroad companies, in doing switching in their freight yards or in freight yards with which they are connected, are not compelled to avoid striking standing freight cars, nor are they compelled to see to it that men at work on the standing cars and aware of the approach of moving cars, should get off before the moving cars are permitted to strike or bump against the stationary cars.

2. **SAME—Exercise of Care by Workmen in Switch Yards.**—Men at work on freight cars in freight yards and who know that in the customary method of switching there the cars do strike together, and that the force may overcome their natural equilibrium, and who see that switching is being done and that such striking is about to occur, are required to protect themselves from danger, and if they do not, they assume the risk.

3. **APPELLATE COURT—Considers Testimony as Well as Law.**—It is the duty of the Appellate Court, under the law as it exists in this State, to consider the testimony, and if they find that the judgment and verdict are not supported by it, or are clearly against the weight of the evidence, to set aside such verdict and reverse such judgment.

Trespass on the Case.—Personal injuries. Appeal from the Circuit Court of Rock Island County; the Hon. WILLIAM H. GEST, Judge presiding. Heard in this court at the April term, 1902. Reversed. Opinion filed July 18, 1902.

JACKSON & HURST, attorneys for appellant.

MCENIRY & MCENIRY, attorneys for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

Dormady was upon a coal car standing on a switch track at Sherrard, in Mercer county. Other cars being pushed by the railway company into and upon said switch were propelled against the car upon which Dormady was, and he lost his balance and fell under the next car, and received serious injuries. He brought this suit against the railway company to recover damages therefor. The declaration contained but one count. It charged that while plaintiff was exercising due care, defendant carelessly and improperly drove and managed the locomotive attached to the cars being pushed upon said switch, and that when said cars

struck the car on which plaintiff was, they were running at a high rate of speed, to wit, fifteen miles per hour, and that the presence and speed of said locomotive and cars were not known to plaintiff. Plaintiff had a verdict for \$3,500 and judgment thereon, and defendant appeals. The only question argued is whether the evidence will support the verdict.

The mine of the Coal Valley Mining Company is north of defendant's main line. Tracks pass from said main line north, to and through and around the buildings at the coal company's shaft, and still further north, to higher ground. It is a part of defendant's duty to push empty coal cars up this incline north of the shaft, and leave them on certain switches. When the coal company is ready to load a car, its employes release the brake on the nearest empty car, and the force of gravity propels it down to the shaft, where it is loaded. Dormady was in the employ of the coal company and had been for several years. It was a part of his daily duty and had been for a long time to go upon these empty coal cars, and shovel off slack coal and refuse which had been left there when it was last unloaded, and in winter to also shovel off any snow and ice which had accumulated on the car, thus preparing the car to receive another load of coal. The cars were open flat cars with plank sides and ends from twenty to twenty-four inches high. On the morning of February 16, 1900, several cars stood upon said switch, and Dormady and one Simmons, another employe of the coal company, were at work shoveling the debris off said cars. Defendant's locomotive pushed fifteen empty cars up past the shaft and to and upon the switch where Dormady and Simmons were at work. The north car, the car nearest Dormady and farthest from the engineer, was equipped with a safety device known as the Janney coupler, by which a coupling could be made by striking the cars together with some force, without any one stepping between the cars to make the coupling. The cars coming in, struck the chain of cars upon which Dormady was at work. Dormady was near the south end of the car and he leaned over and placed one hand on the side of the car and also leaned

upon his shovel. When the cars struck he lost his balance, fell head first between that and the next car, and his legs went across the rail and the wheels passed over them, breaking the bones but not crushing his legs. Plaintiff was substantially the only witness in his own behalf on the material questions, while defendant produced the conductor, the brakeman, an employe of the coal company who went up the grade with the conductor on the head end of the train as it was pushed north, and Simmons, who was working with Dormady, and also other witnesses.

It is clear the speed was not great or excessive. Plaintiff does not state the speed, but only that the train struck the standing cars harder than he had known it to do before. That some force must be used to make the safety coupling was testified to by several witnesses for defendant, and was not denied. It was necessary to prepare the mechanism for the coupling by going in front of the car and opening the knuckle of the coupler. When the head car was some distance from the standing cars the conductor got off the head car, stepped in front of it, and walked along while he opened the knuckle, then stepped out by the side of the train, gave a signal to slow down, which was obeyed, and then walked by the side of the car, and as fast as the car moved, till it struck the standing car. The employe of the coal company who was on the head car also got off, and walked by the side of the car, and kept up with it while walking. The brakeman confirms their testimony. At the time the cars met, the train was not moving faster than a man walks.

The allegation of the declaration that plaintiff did not know of the approach of the train is not supported by any proof. Plaintiff testified he saw it coming before it reached the switch which turned it upon the track where the cars stood, upon which he and Simmons were working, and that he did not then know whether the train was coming upon his track or was going to remain upon the other. He testified he saw it again as it came over the switch, and thought it might strike hard, and called out to Simmons to look out.

Simmons was near the other end of the car and stepped toward the middle, stood erect, and was unharmed. Dormady was near the end of the car toward the approaching train. He did not move toward the middle of the car, as he might have done as easily as Simmons did, but stepped to the side of the car and leaned over, placing his hand on the side of the car, and attempted to brace himself with his shovel, and placed himself in a position which proved to be insecure.

It is clear the conductor twice called out to the man on the car to look out. He did this first before he got off the car to open the knuckle, and again after he had opened the knuckle and stepped out to the side of the train. This is testified to by at least three witnesses, including Simmons, who heard the alarm given twice by some one south of him. At least three witnesses testify the men on the car were standing up and facing them all the time they were coming off the other track. It does not admit of question on the present record that plaintiff, after he knew the train was coming in on his track, and when he knew it might strike hard, and would strike with some force, had time to move away from the end of the car, and would not have been hurt if he had done so. He had been at that particular work at least a year. The putting in of empty cars in this way was a matter of daily occurrence. He was familiar with the Janney coupler (which was in common use), and knew force was used in making the coupling. It is clear the movement of the train and the manner of making the coupling was the usual and customary method employed by defendant theretofore at that mine, and with which plaintiff was well acquainted.

We can not hold it to be the law that a railroad company in doing switching in its freight yards, or in freight yards with which it is connected, must avoid striking standing freight cars, or that if there are men at work on the standing cars, and aware of the approach of moving cars, the railway company must see to it that such men get off before the moving cars are permitted to strike or bump

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against the stationary cars. On the other hand, men at work on freight cars in such yards, and who know that in the customary method of switching there the cars do strike together, and that the force may overcome their natural equilibrium, and who see that switching is being done, and that such striking is about to occur, are required to protect themselves from danger, and if they do not, they assume the risk. Men are continually on and about cars while switching is going on in railroad yards, and they assume the ordinary and known risks of that business when conducted in the usual and customary manner.

It follows from what has been said that we are clearly of opinion that defendant was not guilty of negligence as charged. This was an unfortunate accident, with deplorable consequences to plaintiff, for which defendant is not to blame. The evidence being so overwhelmingly for defendant, we are not at liberty to avoid our duty because the jury has rendered a verdict for plaintiff.

"It is the duty of the appellate courts, under the law as it exists in this state, to consider the testimony, and if they find that the verdict and judgment are not supported by it, or are clearly against the weight of evidence, to set aside such verdict and reverse such judgment. A performance of this duty is absolutely essential for the preservation of the rights of citizens and property owners in all those classes of cases where the judgments of the appellate courts are final and conclusive upon all questions of fact." *C. & E. R. R. Co. v. Meech*, 163 Ill. 305; *Hawk v. C. B. & N. R. R. Co.*, 147 Ill. 399.

Apparently all who were cognizant of the facts were witnesses at the trial, and we think it would serve no useful purpose to remand the cause for another trial. The judgment is therefore reversed.

Finding of Facts to be incorporated in the judgment:

We find from the evidence that defendant was not guilty of the negligence charged in the declaration.

**The People of the State of Illinois ex rel., etc., v.
William T. Church, County Judge, et al.**

1. **MANDAMUS**—*Judicial Discretion Not Controlled by.*—The exercise of judicial judgment and discretion will not be controlled by mandamus.

2. **SAME**—*Change of Venue.*—Mandamus will not lie to compel a judge to grant a change of venue.

3. **APPELLATE COURT JURISDICTION**—*Constitutionality of Statutes.*—The Appellate Court has no jurisdiction to determine the validity or constitutionality of a statute.

Petition for Mandamus.—Appeal from the Circuit Court of Mercer County; the Hon. WILLIAM H. GEST, Judge presiding. Heard in this court at the April term, 1902. Dismissed. Opinion filed July 18, 1902.

CONNELL & THOMASON and BASSETT & BASSETT, attorneys for appellant.

BROCK & SCOTT, attorneys for appellees.

MR. JUSTICE DIBELL delivered the opinion of the court.

The County Court of Mercer County ordered Scott S. Boden, conservator for Robert Scott, an insane person, to file a new bond as conservator by a certain date, in the penal sum of \$180,000, with two or more sufficient sureties to be approved by the court. At the date named, he presented a bond executed by but one surety, and that a non-resident surety company, and its execution was by an attorney in fact. Accompanying the bond were papers tending to show authority in the attorney in fact to execute the instrument, and a certificate by the superintendent of the insurance department of the government of this state tending to show compliance by said surety company with the requirements of the act of June 8, 1897, entitled:

“An act to amend an act entitled, ‘An act to enable corporations, created for that purpose, to transact a surety business in this state, and to become the surety on bonds required by law,’ approved May 13, 1887, in force July 1, 1887.”

Such proceedings were thereafter had in said County

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Court in said matter that said court denied an application by Boden for a change of venue, refused to approve said bond, removed Boden from said office of conservator, appointed A. G. Bridgford as conservator, and denied Boden an appeal. Boden then filed a petition in the Circuit Court against the county judge for a writ of mandamus to compel him to receive and approve said bond, to grant said change of venue, to grant the appeal prayed and to fix the amount of the appeal bond, to remove Bridgford and to authorize Boden to continue to act as conservator. Bridgford was permitted to intervene and defend. The court sustained a demurrer to the petition; the relator elected to abide by his petition; the court dismissed the petition at the costs of the relator; and he prosecutes this appeal. Appellees have moved to dismiss the appeal, and that motion was taken with the case.

The bond presented did not meet the requirement of the County Court, nor did it comply with the provisions of section 3 of chapter 86 of the Revised Statutes, under which a conservator is required to give a bond, nor with the act of 1877 concerning the release of sureties of guardians. The order and the statute concerning such conservators each required two or more sufficient sureties, to be approved by the court. Only one surety was given. No proof of the sufficiency of the surety was made, except the certificate of the superintendent of the insurance department of this state showing that the surety company had filed with that officer a sworn statement alleging a compliance with the laws of this state. This certificate was by section 4 of the act in question made evidence of the solvency and credit of the company and of its sufficiency as surety. All the statute above referred to made directly available for the benefit of an obligee in a bond executed by such a company was the deposit with a state officer in some one of the states of the United States of not less than \$100,000 in good securities, to be held for the benefit of its obligees. The certificate of the superintendent of the insurance department was general in its terms and only set forth that the company had filed a statement showing it possessed

the requisite amount of capital invested as required by law. This statement had been filed with said department nearly a year before this bond was presented for approval. The certificate of the superintendent of the insurance department did not show in what state said securities had been deposited. The penalty of this bond far exceeded the sum required to be so deposited. No proof was made as to the extent of the outstanding obligation of this surety company. It must have incurred many obligations after its statement was filed and this certificate was issued, and before this bond was presented, nearly a year later. If the approval of the bond was a matter of judicial discretion, no reason is perceived for holding that such discretion was unwisely or improperly exercised, or that the county judge should be compelled to exercise his judgment in any different manner; nor will the exercise of judicial judgment and discretion be controlled by mandamus. *The People ex rel. v. Knickerbocker*, 114 Ill. 539.

Appellant, however, claims that the county judge had no discretion, but was required by the statute in question to approve this bond. Section 2 of said act provides, among other things, that whenever a bond is required by any court it may be executed by a surety company qualified as in that act provided; and that such execution of such bond by such company shall be in all respects a full compliance with every law, rule or regulation requiring that such bond shall be executed by one or more sureties, or that such sureties shall be residents, or householders, or freeholders, or either or both, or shall possess any other qualifications. This bond appears to comply with this act, and if its provisions above summarized are valid and binding upon the courts, then it was the duty of the county judge to approve the bond, and he should be compelled by mandamus to do so or to grant an appeal from the order refusing approval.

Appellees claim that the portions of said act here drawn in question are invalid and unconstitutional. First, it is argued that the provisions of the act which make it compulsory upon the courts to approve such a bond are not

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embraced within the title of the act. It is also to be noted, in this connection, that neither the title nor the body of the act profess to amend or repeal the prior statute, section 3, chapter 86, requiring two or more sufficient sureties upon a conservator's bond, to be approved by the court. Second, it is argued that the determination what security shall be required upon a bond given in judicial proceedings is a judicial act; that the constitution confers exclusively upon the courts the authority to perform judicial acts; and that the legislature can not compel the courts to accept as sufficient the obligation of a non-resident surety company which has filed a prescribed statement with the insurance department of the state, and prohibit the courts from determining whether the security thus offered is sufficient to afford protection to the obligee. The question whether the provisions of the act applicable to this bond are valid or invalid is evidently involved in this case. Appellant's counsel argue in their opening brief that they are valid. Appellee's counsel assert they are invalid and unconstitutional. The demurrer purported to be special, but was in fact merely general; and we think it may fairly be inferred from the whole record and the course of argument here, that the court below held that the provisions of the statute here involved were invalid. The act creating appellate courts withholds from our jurisdiction cases involving the validity of a statute or the construction of the constitution. The validity or invalidity of the statute is vital to the case. If it is invalid, the bond was not only properly and necessarily disapproved (having but one surety, when both the prior order of the court and the statute relating to conservators required at least two), but must also have been disapproved on appeal, and a mandamus will not be awarded to grant an appeal which can not be effective. As to the change of venue sought to be compelled, mandamus will not lie to compel a judge to grant a change of venue. The People ex rel. v. McRoberts, 100 Ill. 458.

For the reasons above stated the appeal is dismissed.

Harry Otstot v. The Indiana, Illinois & Iowa R. R. Co.

1. CONTRIBUTORY NEGLIGENCE—*Question of Fact*.—The question whether the parties are respectively guilty of negligence or contributory negligence, is one of fact for the determination of the jury.

2. ASSUMED RISK—*Question of Fact*.—Whether the accident was the result of an assumed risk, is a question of fact.

3. PRACTICE—*Where Court Should Not Take Case from Jury*.—The court is not justified in taking a case from the jury where the state of the proof is such that reasonable minds might reach different conclusions from the evidence offered, together with all justifiable inferences to be drawn therefrom.

4. RAILROADS—*Servants Entitled to All Rights of the Public*.—The rule is well settled in Illinois that a servant of a railroad company, though performing menial labor, like that of a section hand, whether in railroad yards or on private right of way, is entitled to all the rights offered the public, either by ordinance, statute, or general custom of the company.

5. FELLOW-SERVANTS—*Questions of Law and Fact*.—The definition of a fellow-servant is a question of law; whether a given case falls within that definition is a question of fact.

6. SAME—*Who Are*.—In order to constitute servants of the same master fellow-servants within the rule exonerating the master from liability, it is not enough that they be engaged in doing parts of some work or in the promotion of some enterprise carried on by the master not requiring co-operation or bringing the servants together or into such personal relations that they can exercise an influence upon each other promotive of proper caution in respect to their mutual safety, but it is essential that they shall be, at the time of the injury, directly co-operating with each other in the particular business in hand, or that their usual duties shall bring them into habitual consociation, so that they may exercise an influence upon each other promotive of proper caution.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of LaSalle County; the Hon. CHARLES BLANCHARD, Judge presiding. Heard in this court at the April term, 1902. Reversed and remanded. Opinion filed July 18, 1902.

ARTHUR H. SHAY, LEE O'NEIL BROWNE and BREWER & STRAWN, attorneys for appellant.

CARY & WALKER and REEVES & BOYS, attorneys for appellee.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

This is an action on the case for personal injuries inflicted upon appellant, Harry Otstot, by the appellee, the Indiana, Illinois & Iowa Railroad Company.

The injury to appellant, which was the loss of his left leg, occurred on February 7, 1900, while he was working as a section hand for the appellee, repairing tracks, about three blocks south of the depot at Streator, Illinois.

At the close of plaintiff's proof the court, on motion of the defendant, excluded all the evidence and instructed the jury to find the defendant not guilty, which was done. A motion for new trial was denied and judgment rendered against plaintiff for costs, from which he prosecutes this appeal.

The engine which inflicted the injury upon the plaintiff was approaching a street. No bell was rung or whistle sounded.

The declaration consists of five counts, each of which charges that the injury was caused by the negligent driving of the locomotive by one of its servants, not a fellow-servant of plaintiff, and while the plaintiff was in the exercise of due care and caution for his own safety. The first count contains the general charge of negligent driving; the second count charges the failure to ring a bell, sound a whistle or give any warning; the third count charges reckless and wanton negligence; the fourth count charges that defendant failed to furnish a sufficient number of servants, and was operating a locomotive with but one servant; the fifth count charges that the engineer was incompetent and reckless, and that he drove his engine recklessly.

The proof tended to show the engine was in charge of a hostler or assistant engineer, whose duty it was to take engines upon their arrival at Streator to the roundhouse, and to return them when required for the purpose of taking trains out of Streator. The plaintiff was working in a gang of four or five men under the charge of a foreman. At the time of the accident, and for some time immediately

prior thereto, he was digging trenches about the switches in the yards for the company and dipping water out with a shovel. He had his back turned to the direction from which the engine came and had been engaged in that work and in keeping that position for some time, when the engine, which started a few hundred feet from him, without any signal or warning whatever, came upon him, crushing his left leg, necessitating its amputation above the knee.

The proof further shows that there was a previous and existing general custom prevailing in the yards of the defendant company at Streator, as well as a rule of the company, not to start an engine without sounding a whistle or ringing the bell, and that there was also a general custom for the foreman of the section hands, when he was near enough, to warn the men of any approaching danger.

The hostler or assistant engineer had passed the plaintiff on foot a short time before he started the engine. The testimony of the plaintiff showed that he was so busily engaged in his work that he did not see the engineer at that time, and that he did not know where the engine was or that it had started to move until it ran over him.

The plaintiff was sixty years of age at the time of the accident; had worked for the defendant company three or four years, and had previously been engaged as a section hand by the Santa Fe road. The proof further tends to show that the hostler or assistant engineer in charge of the engine could have seen the plaintiff by leaning out of the window of the engine, but could not see him from where he was sitting. There was no fireman upon the engine at the time of the accident.

It is contended by the appellee that the action of the trial court in directing a verdict of not guilty was justified for the following reasons:

1. No negligence of the appellee was established.
2. The appellant was guilty of such contributory negligence as would bar any recovery.
3. The accident was the result of an assumed risk of the appellant's employment.

4. Assuming that negligence on the part of the hostler, Newman, was shown, still appellant can not recover because he was a fellow-servant of Newman.

The rule that the question whether the parties are respectively guilty of negligence or contributory negligence is one of fact for the determination of the jury, is so well settled in this state, that the citation of authorities is no longer necessary. Whether the accident was the result of an assumed risk, is also a question of fact. *Ross v. Shanley*, 185 Ill. 390; *City of La Salle v. Kostka*, 190 Ill. 130; *Western Stone Co. v. Muscial*, 196 Ill. 382. The court is not authorized in taking a case from the jury where the state of the proof is such that reasonable minds might reach different conclusions from the evidence offered, together with all justifiable inferences to be drawn therefrom. *Offutt v. Columbian Exposition*, 175 Ill. 472; *Martin v. C. & N. W. R. R. Co.*, 194 Ill. 138.

Our attention has been invited by appellee to many authorities of other jurisdictions, holding that while railroad companies were required to give certain warnings on the starting of trains, such as the sounding of the whistle and the ringing of the bell, as required by city ordinances, or statutes, or general custom of the company, yet that they owed no such duty to an employe while working for them within their yards, or on their private right of way. It is urged that such safeguards and precautions are for the exclusive protection of the traveling public and that their employes have no right to the same.

Whether such rules prevail in the various states as claimed, has no influence upon us in determining the issues in this case. The rule is well settled in Illinois, that a servant of a railroad company, though performing menial labor, like that of a section hand, whether in railroad yards or on private right-of-way, is entitled to all of the rights offered the public, either by ordinance, statute, or general custom of the company. *I. C. R. R. Co. v. Gilbert*, 157 Ill. 354; *St. L., A. & T. R. R. Co. v. Eggmann*, 161 Ill. 155; *E. St. L. C. R. R. Co. v. Eggmann*, 170 Ill. 538.

It is finally urged that the plaintiff is barred of the right of recovery, because it is alleged that the hostler or assistant engineer was a fellow-servant of the plaintiff. If the contention is meritorious, the right of recovery is barred under the well-settled authorities of this state. The definition of fellow-servants is a question of law; whether a given case falls within that definition is a question of fact. *C. & A. R. R. Co. v. Swan*, 176 Ill. 424; *M. & O. R. Co. v. Massey*, 152 Ill. 144; *I. & St. L. R. Co. v. Morgenstern*, 106 Ill. 216; *C. & W. I. R. Co. v. Flynn*, 154 Ill. 448.

In order to constitute servants of the same master fellow-servants within the rule exonerating the master from liability, it is not enough they are engaged in doing parts of some work or in the promotion of some enterprise carried on by the master not requiring co-operation, or bringing the servants together, or into such personal relations that they can exercise an influence upon each other promotive of proper caution in respect to their mutual safety, but it is essential that they shall be, at the time of the injury, directly co-operating with each other in the particular business in hand, or that their usual duties shall bring them into habitual consociation, so that they may exercise an influence upon each other promotive of proper caution. *C. & N. W. R. R. Co. v. Moranda*, 108 Ill. 576, 582.

P., Ft. W. & C. Ry. Co. v. Powers, 74 Ill. 341, was an action on the case brought by Powers against the railroad company, to recover damages for a personal injury received while ditching a track in the yards of the defendant company. Powers was a section hand. The engine causing the injury was in the charge of an extra engineer or hostler whose duty it was to take engines on their arrival, to the round-house, and to bring them therefrom to be used on the road. The court seems to have construed the case as if there were no distinction between the engineer being in charge of the regular engine or a hostler or assistant engineer. We see none in principle. In that case the court held that where a servant of a railroad company employed to work on the track was run over and injured by

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an engine through the carelessness of the engineer of the company, and the servant injured was not in the same line of employment as the engineer, he might recover for his injuries the same as any other person not in the service of the company, if he was in the exercise of due care for his own safety.

In *C. & A. R. R. Co. v. Kelly*, 127 Ill. 637, it was held that whether a servant of the railroad company killed by the construction train is a fellow-servant of those in charge of the train at the time of the accident is a question of fact, and not one of law for the court.

We hold that the evidence in this case brings it within the rule announced in *Offutt v. Columbian Exposition*, *supra*, and *Martin v. C. & N. W. R. R. Co.*, *supra*, and that the trial court erred in directing a verdict of not guilty. The case was one proper for the consideration of a jury.

For the error committed in directing a verdict of not guilty the judgment of the Circuit Court will be reversed and the cause remanded.

William Hardy v. Fred Wallis, Adm'r.

1. **ADMINISTRATION OF ESTATES—Duty of Heirs Until Administrator is Appointed.**—While the title of the personalty passes to the administrator when appointed, and relates back to the date of the death of the intestate, still that can not make the intervening possession of the heirs wrongful. It is their right and duty to take possession of and preserve the property until an administrator can be appointed.

2. **SAME—Interest of Heirs in Property Subject to Execution.**—Subject to the due administration of the estate, the heirs are owners in common of the residue of the property remaining for distribution. An officer may discover property belonging partly to the defendant in the execution and partly to others, and seize the same upon levy for the purpose of selling such interest. The several owners may be co-tenants or they may be co-partners. In either event the defendant has an interest subject to execution.

3. **DEMAND—Constable Entitled to Demand from Administrator.**—A constable having taken possession, rightfully, of property before an administrator has been appointed over it, is entitled to a demand by the

administrator after he is appointed. He has a right to surrender the property to the administrator upon his being appointed, without subjecting himself to costs.

Replevin.—Appeal from the Circuit Court of Bureau County; the Hon. HARVEY M. TRIMBLE, Judge presiding. Heard in this court at the April term, 1902. Reversed and remanded. Opinion filed July 18, 1903.

C. N. HOLLERICH and J. L. MURPHY, attorneys for appellant.

HORACE R. BROWN and CAIRO A. TRIMBLE, attorneys for appellee.

MR. PRESIDING JUSTICE BROWN' delivered the opinion of the court.

This is an action of replevin brought by Fred Wallis, as administrator of the estate of Mary Wallis, deceased, against William Hardy, a constable, for the possession of certain chattels which the latter had levied upon under an execution against William Wallis, a son of decedent. The proceedings were instituted before a justice of the peace of Bureau county. The defendant failed to appear. A judgment was rendered against him and he appealed the case to the Circuit Court where a trial was had with a jury. The second trial also resulted in a verdict and judgment against defendant, who brings the case to this court by appeal. Various grounds are urged for the reversal of the judgment.

It is contended that the affidavit in replevin is insufficient. Conceding this to be true it must be unavailing to the defendant for the reason that the point was not made in the court below. It is too late to raise it here for the first time.

No demand was made upon the defendant for the surrender of the property to the plaintiff prior to the commencement of the suit. The defendant asked and the court refused instructions stating that such demand was necessary. William Wallis owned the property in controversy and used it in connection with a restaurant conducted by

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him at Spring Valley. After he had been conducting the restaurant business for some time, his father, mother, sisters and a brother also moved to Spring Valley and worked with him in and about the restaurant. January 10, 1901, William Wallis confessed a judgment before a justice of the peace of Bureau county in favor of William Guenther for milk which the latter had furnished him and which was used in the restaurant. An immediate execution was sworn out upon said judgment and placed in the hands of the defendant to execute. On the same day that the execution was issued, the property in question was pointed out to the constable by William Wallis as his property. It was levied upon and possession thereof was taken by the defendant upon the execution.

In January, 1900, Mary Wallis left Spring Valley and went to visit a daughter at Bradford, in the same county, where she died August 8, 1900. January 31, 1901, Fred Wallis, also a son of Mary Wallis, took out letters of administration on her estate in the County Court of Bureau County and immediately instituted this suit against the defendant as constable, without a demand. He claims the property under a bill of sale from William Wallis to Mary Wallis, dated March 17, 1902.

The defendant sought to show that the bill of sale was not delivered in the lifetime of Mary Wallis, and that William Wallis continued to be the proprietor of and exercise the rights of proprietorship over the property in question until the levy was made. The testimony upon the question of the delivery of the bill of sale given by the heirs of the decedent is very conflicting, contradictory, and to say the least, of an unsatisfactory character.

The main question, however, is, assuming that the decedent held the title to the property in question at the time of her death, was a demand necessary? It appears that she died August 8, 1900, intestate; that the property in question remained in the joint use and possession of her heirs to the time the levy was made. The property was pointed out to the constable by William Wallis, one of the heirs of

the decedent. The others made no protest against its seizure upon the execution. It is evident that administration of the estate up to this time was never contemplated by any of the heirs. Letters of administration were not applied for or issued until some time after the levy of the execution.

While the title of the personalty passes to the administrator when appointed, and relates back to the date of the death of the intestate, still that can not make the intervening possession of the heirs wrongful. It was their right and duty to take possession of and preserve the property until an administrator could be appointed. The heirs were all interested in the property. They had such interest therein as would entitle them to have the property or the proceeds thereof returned to them by the administrator after the payment of the costs of administration and the debts of the decedent.

We think under the circumstances of this case that William Wallis had an interest in the property subject to levy upon the execution, and that his interest might be sold thereon. The purchaser, however, might be deferred in receiving any benefit therefrom until it could be ascertained by a proper administration of the estate what share of the proceeds he was entitled to.

Subject to the due administration of the estate, the heirs are owners in common of the residue of the property remaining for distribution. An officer may discover property belonging partly to the defendant in the execution and partly to others, and seize the same upon levy for the purpose of selling such interest. The several owners may be co-tenants, or they may be co-partners. In either event, the defendant has an interest subject to execution. Freeman on Executions, Sec. 254.

The constable having taken possession rightfully of this property was entitled to a demand by the administrator. He had a right to surrender the property to the administrator upon his being appointed, without subjecting himself to costs. We hold that the court erred in refusing to instruct the jury that a demand was necessary.

Economy Light & Power Co. v. Sheridan.

Various rulings of the trial court were improper. John Wallis, husband of the decedent, having testified to his wife's ownership of the property, the court erred in refusing to permit him to be asked on cross-examination, if he had not made statements at various times and places to parties named in the interrogatories which would tend to contradict the testimony he had given in chief. The court also erred in refusing to admit proof that there was a sign kept upon the restaurant, "William Wallis, proprietor," and also improperly refused proof relating to the character of the advertisements about the place, showing that William Wallis was proprietor at a date subsequent to that of the alleged bill of sale. The court also improperly refused to admit the bills of fare used in the restaurant at that time which were signed "William Wallis, proprietor." The court properly refused to permit William Wallis to testify to facts occurring in the lifetime of the decedent. He was an interested party and an incompetent witness under the statute. The court, however, erred in refusing to permit him to testify on behalf of defendant as to matters which occurred subsequent to the death of the decedent. The same is true as to William Guenther, plaintiff in the execution.

For the errors indicated the judgment of the Circuit Court will be reversed and the cause remanded.

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1. **DAMAGES**—*In Personal Injury Cases*.—The question of damages in personal injury cases is largely a matter for the reasonable discretion of a jury.

Action on the Case, for personal injuries. Appeal from the Circuit Court of Will County; the Hon. JOHN SMALL, Judge presiding. Heard in this court at the April term, 1902. Affirmed. Opinion filed July 18, 1902.

GARNSEY & KNOX, attorneys for appellant.

DONAHOE & McNAUGHTON, attorneys for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This was an action brought by appellee, as administrator of the estate of Martin Sheridan, deceased, to recover damages for the death of his intestate, alleged to have been caused by the negligence of appellant. There were numerous counts in the declaration, charging the negligence of appellant in various forms, to which there was filed a plea of the general issue. At the conclusion of the evidence offered on behalf of appellee, appellant asked the court to exclude the evidence and direct the jury to find a verdict in favor of the defendant. This the court refused to do. Appellant introduced no evidence on its behalf and its counsel declined to make any argument to the jury.

The court instructed the jury as to the form of their verdict, no other instructions being asked for or given on either side. The jury returned a verdict in favor of appellee in the sum of \$3,000, for which amount, a motion for new trial having been overruled, judgment was given.

Appellant seeks to reverse the judgment for three reasons: First, because certain material allegations of the declaration, to wit, that decedent came in contact with the wires and that at the point of contact the wires of appellant were imperfectly insulated or completely uninsulated, were not supported by any proof. Second, because the court erred in overruling appellant's objection to a hypothetical question, propounded to an expert witness, which assumed the existence of proof of the averments of the declaration above mentioned. Third, because the damages are excessive.

At the time of his death deceased was employed by the Chicago Telephone Company as a lineman. He was a single man, thirty-five years of age, earning \$40 a month, in addition to his board and expenses. The telephone company had a line of poles along the tow path of the Illinois and Michigan canal from Chicago, through and beyond Joliet.

An arrangement had been made between the telephone company and appellant, by which the latter was permitted to string certain of its wires upon the poles of the telephone company, in order to furnish light to a firm of contractors working for the Chicago Sanitary District upon its drainage canal. As work on the drainage canal progressed, it became necessary to make certain changes in the line of poles belonging to the telephone company. In the course of the work necessitated by the change, deceased ascended a pole of the telephone company to make fast a suspension wire to be used to support a cable over the channel of the drainage canal. While standing on a cross-arm to which appellant's wires were attached, with one foot on each side of the pole, Sheridan suddenly uttered an exclamation of apparent pain and fell to the ground. He struck on his head and shoulders and was instantly killed. One of the electric light wires was on the pin near the end of the cross-arm and the other on a pin some six or eight inches from the pole. There was no glass insulator on the pin next to the pole. The wires were charged with an electric current of some 1100 volts pressure. The witness Fillion testified that after Sheridan's body was removed he went up the pole and examined the electric light wire next to the pole and found it pretty much bare on each side of the arm, and that it was bare in a good many places. Witness Sampson also testified that he examined the electric light wire after Sheridan's death, at the place where Sheridan stood, and that it was in a poor condition and the wire was bare. Shortly before he ascended the pole, Sheridan had walked across the drainage channel, which had some water in it, making his shoes damp. He was handling a wire of the telephone company which extended across the channel. The witness McNally testified that just before he fell Sheridan uttered a wild scream; that he looked wild and his eyes turned up in his head. We are of opinion that all the facts in proof warranted the jury in finding that the wire of appellant, at the place where he stood, was bare, or defectively insulated, and that deceased came in contact with it

and received therefrom a shock of electricity which caused him to fall from the pole.

The objection which appellant makes to the hypothetical question is, that there is no proof that the decedent made contact with the wire, or that the wire at the cross-arm was bare and the insulation worn off. As there was, however, proof in the record, as above shown, tending to establish these averments of the declaration assumed by the hypothetical question, the latter was not subject to the objection now urged against it.

The proof shows that deceased left surviving him a mother, two brothers and three sisters, some of whom are married and others unmarried. His mother lived in Iowa, and he at times lived with her. A witness swore that she had seen him give money to his mother; that she had read letters from him to his mother, and that the letters sometimes inclosed money and sometimes money orders to his mother. The proof clearly made out a case for more than nominal damages. In *City of Chicago v. Keefe, Adm'r*, 114 Ill. 222, where the suit was brought for the benefit of the next of kin, who were, in that case, the father, mother, four brothers and four sisters, the court says, in reference to the question of damages :

"The question is in its nature incapable of exact determination, and the jury should therefore calculate the damages in reference to a reasonable expectation of benefit, as of right, or otherwise, from the continuance of the life. Parents, and even brothers and sisters, might reasonably expect in many ways to derive pecuniary benefit from the continued life of the intestate, as of grace and favor, if not of right, at any age of life, and our statute imposes the duty of support, in the event of their becoming paupers, of the parent by the child, and of one brother or sister by another brother or sister."

In *O. & M. Ry. Co. v. Wangelin, Adm'r*, 152 Ill. 138, in which the next of kin was a sister, it is said :

"It is not required that the evidence shall afford data from which the extent of the pecuniary loss can be ascertained with a reasonable degree of certainty. The statute says that 'the jury may give such damages as they shall

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deem a fair and just compensation.' In *Chicago & Alton Railroad Co. v. Shannon*, 43 Ill. 338, this court said: 'How this pecuniary damage is to be measured—in other words, what is to be the amount of the verdict—must be largely left (within the limits of the statute) to the discretion of the jury. The legislature has used language which seems to recognize this difficulty of exact measurement, and commits the question especially to the finding of the jury.' And similar language has been used in numerous subsequent cases."

From the above authorities it appears the question of damages in cases such as this is largely a matter for the reasonable discretion of a jury. As Sheridan sometimes lived with his mother and from time to time furnished her pecuniary aid, we do not feel disposed to reverse the judgment on account of excessive damages. The judgment of the court below will therefore be affirmed.

John Whalen v. Utica Hydraulic Cement Co.

1. MASTER AND SERVANT—*Assumed Risks of Employment*.—Whether a certain danger is an assumed risk of the employment, is a question of fact for the jury.

2. PRACTICE—*Where Court Should Not Take Case from Jury*.—The court is not justified in taking a case from the jury where the state of proof is such that reasonable minds might reach different conclusions from the evidence offered.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of La Salle County; the Hon. HARVEY M. TRIMBLE, Judge presiding. Heard in this court at the April term, 1902. Reversed and remanded. Opinion filed July 18, 1902.

LEE O'NEIL BROWNE and BREWER & STRAWN, attorneys for appellant.

DUNCAN & DOYLE, attorneys for appellee.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

This was an action on the case brought by appellant

against appellee for personal injuries received by appellant while acting as an employe of appellee in its cement rock quarries. Plaintiff's declaration contained two counts charging defendant with negligence in not keeping its quarry in a reasonably safe condition, whereby plaintiff, while exercising due care, was injured by the falling of a mass of frozen earth and rock.

Defendant filed a plea of the general issue and a trial by jury was had. At the conclusion of the plaintiff's case defendant moved to exclude the testimony and instruct the jury to find the defendant not guilty, which motion was sustained and the jury returned a verdict of not guilty, as directed. Plaintiff's motion for a new trial was overruled and judgment was entered on the verdict. Plaintiff saved exceptions to the adverse rulings of the court and appealed to this court.

Appellee had been engaged in the manufacture of cement at Utica, in La Salle county, for many years. It mined cement rock during the greater part of the year by tunneling in the bluffs. During the winter it removed the stripping, consisting of eight or ten feet of overlying dirt and stone, from the cement rock in its open quarries. The frozen earth and stone composing the stripping was loosened and broken by blasting, further broken when necessary by men with picks, shoveled into small cars which ran on a track and were propelled by horse power, and drawn out of the quarry. The work was organized in departments, each man having only one kind of labor to perform. There were men who laid track as it was required, men who blasted, men who did pick work, men who did shoveling into the cars, men who removed the cars when filled and returned the empty cars to be filled. All were under the direction of a superintendent of appellee.

The shovelers worked in gangs of five or six. Each gang had two tracks upon which cars were loaded alternately. While a car was being loaded upon one track an empty car was placed upon the other. As soon as a car was filled the gang went to the other track and commenced filling the

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empty car, while the loaded car was hauled away and an empty one placed in position to be loaded in its turn.

At the point where the accident occurred the stripping had been broken and thrown up by blasting. It consisted of frozen masses of rock and earth. One large mass was thrown up above the general surface and projected over the edge of the bank, appellant testified, about a foot, others, three to four feet, and one six feet. It was eight or ten feet above the track. An empty car was placed for loading opposite this overhanging mass and at the foot of the bank or sides of the quarry. The bank sloped back from the track just as it had fallen or slipped down in the blasting so that the projecting mass overhung without overhanging the track. The gang of shovelers, which included appellant, had finished loading a car on the east bank and went to load the empty car on the west track. Appellant had no sooner taken the place he was obliged to take to load the car than the overhanging mass broke and fell, striking the sloping bank and then appellant, hurling him against the car and producing a compound fracture of the leg in two places and otherwise injuring him, so that he has ever since been partially disabled and only able to do light work. In describing the accident appellant said:

“ We came over to that track and went in there to shovel, and I had not time to bend down, when it rolled clean down on top of me.”

Appellant was forty-eight years old and earned \$1.25 a day. He was confined to his bed from March 17, 1899, to July of that year. He was so seriously injured that the broken bones protruded through the flesh. The attending physician testified the injuries were permanent.

The shovelers had nothing to do with the blasting, or cutting away or taking down the bank, or anything except to shovel the loose stripping, when prepared for them, into the car. Appellant testified that he saw this mass was overhanging a little, but did not think it was dangerous; that he did not have time to look around at all; that he was obliged to stand where he did in order to shovel the stripping into the car.

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The relation between appellee and appellant was that of master and servant. It is the duty of the master to use reasonable care to furnish the servant a reasonably safe place in which to perform his work and to use like care to keep the place in such condition; and the servant has the right to rely upon the master performing his duty without making a critical examination of his surroundings. Whether the danger was an assumed risk was a question of fact for the jury. *Ross v. Shanley*, 185 Ill. 390; *City of LaSalle v. Kostka*, 190 Ill. 130; *Western Stone Company v. Muscial*, 196 Ill. 382.

The court is not justified in taking a case from the jury where the state of the proof is such that reasonable minds might reach different conclusions from the evidence offered, together with all justifiable inferences to be drawn therefrom. *Offutt v. Columbian Exposition*, 175 Ill. 472; *Martin v. C. & N. W. Ry. Co.*, 194 Ill. 138.

We are of the opinion that the evidence in this case falls within the rule above stated and that the trial court erred in directing a verdict of not guilty.

The judgment of the Circuit Court will be reversed and the cause remanded.

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Consolidated Fireworks Co. of America v. Frederick Koehl.

1. **MASTER AND SERVANT—*Dangerous Explosives.***—Where a fireworks company sells a bill of goods on condition that it will send men to superintend the firing of such fireworks, the men so sent are servants of the company and it is responsible for their negligence in firing the explosives.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of LaSalle County: the Hon. HARVEY M. TRIMBLE, Judge presiding. Heard in this court at the April term, 1902. Affirmed. Opinion filed July 18, 1902.

WEART & WEART, attorneys for appellant; R. S. THOMPSON, of counsel.

HENRY M. KELLY and LINCOLN & STEAD, attorneys for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

This cause was before this court and the Supreme Court in 92 Ill. App. 8 and 190 Ill. 145. Those opinions contain a history of the case, which need not be repeated here. Since those decisions there has been another trial, and plaintiff has recovered another verdict against the fireworks company for \$4,000 and has had judgment thereon, from which said defendant prosecutes this appeal. There was some further proof on each side at the last trial, but nothing to make the facts appear materially different from what they did when the case was here before.

One count of the declaration, after describing the situation and that there were large quantities of fireworks present which contained powerful explosives and highly inflammable material, stated that it was the duty of defendants to exercise ordinary care in handling and discharging said fireworks and to protect and keep covered the fireworks not in actual use and which were not at the time being discharged, in order to prevent the premature explosion thereof by reason of sparks falling thereon; that defendants did not exercise ordinary care in that regard, but carelessly, negligently and recklessly handled and discharged said fireworks, and failed to protect and cover the said fireworks not in actual use, and not at that time being discharged; and by reason thereof, a large portion of said fireworks which were located at the place aforesaid were set on fire and prematurely exploded, and by means thereof the plaintiff, while standing on a public street and in the exercise of ordinary care, was struck and injured. Another count charged that defendant negligently used, stored and discharged said fireworks, and negligently failed and neglected to protect and guard a large portion of said fireworks, but left them uncovered and unprotected, whereby said fireworks were ignited and caused to be prematurely exploded by contact with sparks and pieces of discharged fireworks which were thrown in the air by reason of the

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discharge of said fireworks by said defendants, and that plaintiff, while in the exercise of ordinary care for his own safety, was struck by one of the pieces of said fireworks then thrown out by reason of such premature explosion of fireworks, breaking his left leg and inflicting upon him permanent injuries, etc. Other counts charged negligence in allowing a large portion of said fireworks to be and remain uncovered and wholly unprotected near where the fireworks were being discharged, by means whereof a large portion of said fireworks, by contact with sparks from fireworks being discharged, became ignited and prematurely exploded, and injured plaintiff while he was using due care. The proof warranted the jury in finding that Barber and Rowden, who fired the display, opened boxes of dangerous explosives, and left them open near where the fireworks were being set off, and exposed to the danger of being ignited by falling sparks from other fireworks which were being set off, and that they laid other fireworks upon the lids of boxes, and exposed to falling sparks; that it was negligence to thus leave these articles exposed; that these fireworks were prematurely ignited and discharged when the Japanese shell fell, and that this negligence caused plaintiff's injury. An effort was made to show that Barber and Rowden asked a member of the committee for something with which to cover the fireworks, and that it was not furnished. This, however, does not excuse their act in uncovering them and leaving them exposed, and proceeding to fire the display while dangerous explosives were exposed to falling sparks.

Barber and Rowden were in the employ and pay of the fireworks company, and were sent by them to fire this display. If they were merely servants of the fireworks company loaned to the committee to do certain work for the committee, there would be great force in the positions taken and authorities cited by the fireworks company. We are of opinion, however, that the proof warranted the jury in finding that for the price the committee agreed to pay, the fireworks company not only sold the listed articles, but

also contracted to send a man or men to take charge of the fireworks and fire off the display; that the company agreed to take charge of the fireworks and conduct the discharge thereof; and that Barber and Rowden, whom the company sent down, were the fireworks company's servants to perform that part of the contract, and their negligence was the negligence of the company. True, the committee furnished the location for the display, sent up such lumber and material as these men wanted, directed the fireworks should not be discharged while a certain electrical display passed along the street, and perhaps gave some other like orders. But in the only material matter of how to safely handle, protect and discharge these fireworks, the committee took no part, but Barber and Bowden exercised their own judgment. Guthmann testified concerning his interview with an officer of the fireworks company, in telling him they wanted to make such an arrangement :

“ I told him we had corresponded with other fireworks companies and got their prices, and they all had said that they would send down men to take charge of the fireworks, and that that was the reason I was there, as there were none of us knew anything about fireworks, and we wanted the people to take charge of the show. He agreed with me on that, and that was the end of our business. He sold me the fireworks, and men to take care of the show.”

The committee were not engaged in an enterprise for personal profit. They were buying dangerous explosives which they did not know how to handle safely. It was because the fireworks company agreed to send some one, both to take charge of the fireworks, and also to fire them off, that the contract was given to that company. We are of opinion the company became bound to send a competent man, and became responsible that he should exercise care commensurate with the danger of the work.

It is argued the damages are excessive. When we consider the pain plaintiff suffered, that his leg is shortened, and he is thereby permanently unfitted for many of the activities of life, in connection with the time he was wholly laid aside from work, and the expense of his care and med-

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ical attention, we do not feel warranted in disturbing the verdict on that ground. We find no material harm was inflicted upon the fireworks company by the modification of two of its instructions. The jury were fully instructed in its behalf. No instructions were requested by plaintiff. We find no reversible error in the matters covered by the assignments of error which have been argued here. The judgment is therefore affirmed.

Daniel McNabb v. President and Board of Trustees of the Village of Tonica.

1. *STATUTES—Repeal of Statute Giving Special Remedy.*—Where a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits must terminate wherever the repeal finds them.

2. *PRACTICE—Court Must Decide According to Law in Force When Decision is Made.*—It is the duty of the court to determine the case upon the law in force at the time of the rendition of its decision.

Mandamus.—Appeal from the Circuit Court of La Salle County; the Hon. HARVEY M. TRIMBLE, Judge presiding. Heard in this court at the April term, 1902. Affirmed. Opinion filed July 18, 1902.

BERT GUNN and McDougall & Chapman, attorneys for appellant.

LINCOLN & STEAD, attorneys for appellees.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

This was a petition for mandamus by Daniel McNabb to compel the president and board of trustees of the village of Tonica to disconnect certain territory of the petitioner lying within the corporate limits of the village. The petition was filed September 12, 1901. The court sustained a demurrer to the petition. The petitioner abided by his petition. The court dismissed the petition and rendered judgment for costs against the petitioner who brings the case to this court by appeal.

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The proceedings were instituted under the provisions of "An act in relation to the disconnection of territory from cities and villages," in force May 29, 1879. This act was held to be mandatory in *Young v. Carey*, 184 Ill. 618. The act of 1879 was repealed by an act passed with an emergency clause, May 10, 1901. The latter act provides that it "shall apply to and affect all cases where property has not been disconnected by such city council, or such trustees of such village, whether application has been made for disconnection or not."

Petitioner's property had not been disconnected when the act of 1901 went into effect, and that act deprived him of the right to compel the village authorities to disconnect it. The repeal of the act of 1879 takes away all right of the petitioner to proceed thereunder, as effectually as if the law had never existed. If a statute giving a special remedy is repealed without a saving clause in favor of pending suits all suits must terminate where the repeal finds them.

If this proceeding had been commenced prior to the act of 1901 (but it was not), and while the act of 1879 was in full force and effect, yet, it would be the duty of the court to determine the case upon the law in force at the time of the rendition of its decision. *Vance v. Rankin*, 194 Ill. 625; *City of Charleston v. Wiley*, 195 Ill. 433.

It follows that the court below acted properly in sustaining the demurrer and dismissing the petition.

The judgment of the Circuit Court will be affirmed.

S. H. Kennedy v. Perry L. Persons.

1. PRACTICE—*Adjusting Equities Where Both Parties Are Not Parties to the Suit.*—In an action at law on a written instrument, the equities between one party to the suit and one who is not a party can not be adjusted, as no accounting can be had between them.

Assumpsit.—Appeal from the Circuit Court of Lake County; the Hon. CHARLES H. DONNELLY, Judge presiding. Heard in this court at the April term, 1902. Reversed and remanded. Opinion filed July 18, 1902.

R. W. COON, attorney for appellant.

WHITNEY, UPTON & WHITNEY, attorneys for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This was a suit by appellant upon the following instrument in writing, given to him by appellee:

"\$1150 WAUKEGAN, ILLS., Oct. 10, 1900.
Received of S. H. Kennedy, the sum of eleven hundred and fifty dollars (\$1150) for the following purposes: To pay the widow's award, and her one-third interest in the personal estate of Samuel Breakwell, deceased, if the same are required to be paid by the court; if not, to return the same to S. H. Kennedy. Second, to pay the claims filed and allowed in said estate upon and prior to September 24, 1900, and to pay the costs of administration in said estate, and the administrator's fee of \$75.00 and attorney's fee of \$25.00 as agreed upon in the said estate..

PERRY L. PERSONS,
Adm. *de bonis non* Est. Saml. Breakwell, deceased."

The proof showed that the sum of \$895.54 of the \$1,150 mentioned in the above instrument, was not required to make the payments therein provided for, and that Persons, instead of returning the same to Kennedy as he promised, divided it equally between two heirs of said Samuel Breakwell, deceased, one of whom was Samuel J. Breakwell and the other his sister, Mrs. Doyle. The sister afterward paid appellant the amount she had received, with interest, but Samuel J. Breakwell has not paid the amount received by him, and this is a suit by Kennedy against Persons to recover that sum and interest.

Pleas of the general issue and that Kennedy was the agent of Breakwell, were filed. Issue was not properly joined on the latter plea, but it was treated as so joined by the court. A jury was waived and there was a finding and judgment in favor of the defendant, Persons.

It appeared from the evidence that Samuel J. Breakwell had formerly been administrator of the estate of Samuel Breakwell, deceased, but had been removed before the estate was settled, and Persons had been appointed in his place; that Samuel J. Breakwell had given Kennedy a trust

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deed on real estate owned by him to secure a note for \$2,000; that part of the consideration of the note was a prior debt and the rest was intended to cover such sums as might be needed to be advanced to Persons to close the estate; that certain real estate of Samuel Breakwell, deceased, had been sold, and the attorney for the purchaser had insisted, before the contract was closed, that enough money be placed in Persons' hands to cover all that would be required to pay the debts of the estate; that Kennedy thereupon advanced \$1,150 to Persons and took from the latter the written instrument above set out.

It appears from a consideration of the whole record in this case that the trial in the court below was devoted largely to the question whether or not Kennedy was an agent of Samuel J. Breakwell, and the condition of their accounts with each other. The court evidently attempted to adjust the equities between Kennedy and Breakwell arising out of their dealings, including the \$2,000 mortgage. That is a matter, however, which can not be adjusted in this case, to which Breakwell is not a party and in which an accounting can not be had between him and Kennedy. This is a suit at law upon the written instrument. By that instrument Persons agreed to return the balance not necessary to be used for the purposes named therein, to Kennedy, but he has not done so. Appellant has a legal right in a court of law to have Persons return to him the balance not used in the settlement of the debts of the estate. The settlement of accounts between appellant and Breakwell must be left for another action to which the latter is made a party. The judgment of the court below is therefore reversed and the cause remanded.

John Nehring v. Chris Larson.

1. PRACTICE—*Where Evidence is Conflicting.*—Where the evidence is conflicting, the jury and trial judge have superior opportunities to judge of the credibility of the witnesses, and this court will not disturb the conclusion of facts reached by the jury and approved by the judge who tried the case.

Trespass, for assault and battery. Appeal from the Circuit Court of DeKalb County; the Hon. CHARLES A. BISHOP, Judge presiding. Heard in this court at the April term, 1902. Affirmed. Opinion filed July 18, 1902.

CARNES & DUNTON, attorneys for appellant.

CLIFFE & CLIFFE and JAMES W. CLIFFE, attorneys for appellee.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

This is an action of trespass for assault and battery. There was a trial by jury which resulted in a verdict and judgment for \$75. A former trial resulted in a disagreement of the jury. There are no questions of law presented for our consideration. The only reason urged for a reversal is that the verdict and judgment were unwarranted by the evidence.

The evidence is conflicting. The jury and trial judge had superior opportunities to judge of the credibility of the witnesses. We see no reason for disturbing the conclusion of facts reached by the jury and approved by the judge who tried the case.

Judgment affirmed.

James Cole, Sr., et al., v. Central Railway Co.

1. INSTRUCTIONS—*Duty of Drivers of Street Cars.*—An instruction which states to the jury that "under the law of this state those in charge of the operation of street cars upon the public highway are not required to stop their cars, or slacken their speed, merely because they observe

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others upon the streets approaching the tracks upon or over which their car or cars are then being operated, and such person or persons are at the time out of the way of being injured thereby, and in this case even though you may believe from the evidence that the motorman in charge of the car that produced the injury and damage complained of in this case, saw the person having charge of the plaintiff's team drive off from Eaton street to Adams street in the direction of the tracks the defendant's car was then running on, and at such time such person and team in his charge was then out of the way of injury and damage by such car while running on defendant's tracks, then such motorman was not required to stop his car or slacken its usual speed in expectation of the person having charge of plaintiff's team and property putting plaintiff's property in the position of danger or injury by said car of defendant," is erroneous. Such a rule does apply in cases where vehicles are proceeding parallel with the tracks between streets, as it can not be anticipated by those in charge of the street car that the driver of vehicles so proceeding will turn suddenly across the track. But where the driver of a vehicle is approaching a car track at a street crossing, as though about to cross the same, it is a question of fact for the jury whether or not the driver is using due care in attempting to cross, and whether the persons in charge of the car, in case of a collision and subsequent injury, are guilty of negligence.

2. *SAME—Incorrect Statement of Plaintiff's Duty.*—An instruction which states that it is the duty of appellant to show that the injury and damage complained of was caused by the negligent act of defendant "and in the manner charged in the declaration," is erroneous, where there were five counts in the declaration charging defendant with various acts of negligence. The statements intended to be descriptive of the injury should have been "in the manner charged in the declaration or one or more counts thereof."

3. *STREETS—Right of Way at Intersections.*—At street intersections neither vehicle nor street car has the absolute right of way to the exclusion of the other. Their rights are reciprocal, and each must respect those of the other.

Trespass on the Case. for personal injuries. Appeal from the Circuit Court of Peoria County; the Hon. LESLIE D. PUTERBAUGH, Judge presiding. Heard in this court at the April term, 1902. Reversed and remanded. Opinion filed July 18, 1902.

IRWIN & SLEMMONS, attorneys for appellants.

I. C. PINKNEY, attorney for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This is a suit by appellants against appellee to recover damages occasioned by a collision between one of appellee's

street cars and appellants' team and wagon, at the intersection of two streets in the city of Peoria, whereby one horse was killed, another injured and the wagon badly damaged. The jury found a verdict in favor of appellee and there was a judgment against appellants for costs, from which they appealed to this court.

It appears from the proofs that at the time of the collision in question, the streets were somewhat slippery from rain and sleet the night before. The driver of appellants' team, seated on a heavy truck wagon, approached Adams street from Eaton street with his team at a walk. Eaton street slopes slightly toward Adams street, which it crosses at right angles. Appellee's car tracks run along Adams street, and the approach of the cars was concealed to some extent from appellants' driver as he came down Eaton street, by bill boards at the street corner. As the driver neared the street car tracks, however, he saw a car coming rapidly toward him and attempted to cross the tracks ahead of it. The wagon had gotten partially across when the car struck it and caused the injury complained of.

The second instruction given for appellee was as follows :

"The jury are instructed, that under the law of this state those in charge of the operation of street cars upon the public highway are not required to stop their cars, or slacken their speed, merely because they observe others upon the streets approaching the tracks upon or over which their car or cars are then being operated, and such person or persons are at the time out of the way of being injured thereby. And in this case, even though you may believe from the evidence that the motorman in charge of the car that produced the injury and damage complained of in this case saw the person having charge of the plaintiffs' team drive off from Eaton street to Adams street in the direction of the tracks the defendant's car was then running on, and at such time such person and team in his charge was then out of the way of injury and damage by such car while running on defendant's tracks, then such motorman was not required to stop his car, or slacken its usual speed, in expectation of the person having charge of plaintiffs' team and property putting plaintiffs' property in the position of danger or injury by said car of defendant."

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This proposition is not, in our opinion, true, as a matter of law, when applied to the intersection of streets. It does apply in cases where vehicles are proceeding parallel with the tracks between streets, as it can not be anticipated by those in charge of the street car that the driver of vehicles so proceeding will turn suddenly across the track. But where a driver of a vehicle is approaching a car track at a street crossing, as though about to cross the same, it is a question of fact for the jury whether or not the driver is using due care in attempting to cross and whether the persons in charge of the car, in case of a collision and consequent injury, are guilty of negligence. At street intersections neither vehicle nor street car has the absolute right of way to the exclusion of the other. Their rights are reciprocal and each must respect those of the other. *Chicago General Ry. Co. v. Carroll*, 91 Ill. App. 356; *North Chicago Street R. R. Co. v. Smadraff*, 189 Ill. 155.

For the error in this instruction the judgment of the court below must be reversed and the cause remanded.

The first instruction given for appellant was incorrect in stating that it was the duty of appellant to show that the injury and damage complained of was caused by the negligent act of appellee, "and in the manner charged in the declaration."

There were five counts in the declaration charging appellee with various act of negligence. The statement intended to be descriptive of the injury should have been "in the manner charged in the declaration or one or more counts thereof." It is mentioned merely, that a like fault may be avoided on another trial. Reversed and remanded.

Elizabeth Carr Mason v. William N. Hartgrove.

1. **TRUSTEES—Foreclosure of Mortgage.**—One who acts as agent of the mortgagor and receives an assignment of the outstanding certificate of purchase, under a written agreement with him to buy up the same, can not afterward set up that the mortgagor's title in the land was cut off by foreclosure, and hold the property as his own.

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Bill for an Accounting, and for a re-conveyance of property. Appeal from the Circuit Court of Knox County; the Hon. GEORGE W. THOMPSON, Judge presiding. Heard in this court at the April term, 1902. Reversed and remanded with directions. Opinion filed July 18, 1902.

FLETCHER CARNEY and JAMES W. CARNEY, attorneys for appellant.

W. T. SMITH, attorney for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This was a bill in chancery by appellant against appellee, setting up that on May 22, 1900, appellant owned an undivided third of certain lands in Fulton county, Illinois, upon which there was located a valuable coal mine, together with certain coal cars and other property used in the operation of the mine; that on said date one William Nicholson held a certificate of purchase from a foreclosure sale of complainant's interest in said premises; that the period of redemption was about to expire within a few days; that the amount required to redeem from said sale was about \$1,312; that on the date aforesaid the following agreement in writing was entered into between appellant and appellee:

"It is agreed between William N. Hartgrove of the first part, and Elizabeth Carr Mason, by A. C. Mason, her agent, of the second part, witnesseth, that the party of the first part agrees with the party of the second part, to go to Cuba, Fulton county, Illinois, on the 23d, to-morrow, and pay to William Nicholson about thirteen hundred and twelve dollars due on certificate of sale of one-third interest in what is known as the Star Coal Mine, sixty acres, and described in said certificate, and in consideration of raising the money to redeem from said sale of said land belonging to said Elizabeth Carr Mason, it is mutually agreed between the parties to this agreement, that the property described in said certificate, to wit, the Star Mine, shall be sold within the next six months from this date, and the thirteen hundred and twelve dollars, or thereabout, paid out of said sale, and the balance received from said sale, to be equally divided between the said Hartgrove and Elizabeth Carr Mason; and on the return of the said Hartgrove with the said certificate, immediately the said Mason shall make a good and sufficient warranty deed to said Hartgrove and

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the certificate shall be returned to be canceled by the court, and on the making of said deed the said Hartgrove shall give to Elizabeth Carr Mason a contract for the sale of the property described by said certificate, together with the one-third of the machinery belonging to her, within six months, also one-third of one team and other personal property at the mine or city of Galesburg, for the purpose of paying back the money advanced, and make division of the balance with said Hartgrove, as aforesaid.

Dated this 22d day of May, 1900.

W. N. HARTGROVE. (Seal.)

/ ELIZABETH CARR MASON, (Seal.)

By A. C. MASON, Agent.

That appellee instead of redeeming said land took an assignment of said certificate to himself and when the redemption had expired, received a deed for the premises in his own name; that appellee entered into possession of the premises and up to the present time has received the rents and profits; that said action of appellee was a fraud on appellant, and that he in equity never became the owner but took the title to the premises as trustee for appellant; that appellant permitted appellee to take possession of the property upon the understanding that it was to be held as security for repayment of money advanced by him for the redemption of the same; that appellee now claims the property as his own and refuses to account to appellant for the same.

The bill asks for an accounting, prays that appellee may be compelled to convey said premises to appellant upon payment of the amount, if anything, which may be found due appellee on accounting, and for such other and further relief as equity may require. By an amendment to the bill afterward filed, appellant charged that appellee, after obtaining title to the premises, failed and refused to give appellant a contract for the sale of the property and failed to co-operate with appellant for the sale of the land; that on January 5, 1901, appellee mortgaged the premises to one Gray, to secure the payment of \$2,000, and asked for an accounting in regard to this mortgage in addition to the accounting prayed for in the original bill. The answer of

appellee admits the execution of the written agreement set out in the bill of complaint, and that there was to be a new agreement between the parties to be executed immediately after appellee acquired title to said premises; admits that he took the title of said premises to himself, but denies that he took the same as security for money advanced; avers that by the written agreement above set out and by the one afterward to be made between the parties, appellee was to buy, and be the absolute owner of, the premises, and that all the right, title or interest appellant had or was to have, was to sell the same during the said six months for the compensation set forth. Replication was filed and the cause was referred to the master, who took the evidence and reported the same to the court. Upon the hearing the court dismissed the bill for want of equity.

We are of opinion that the proofs in this case sustain substantially the allegations of the bill. Instead of canceling the certificate of purchase and taking the deed from appellant, as provided by the agreement, appellee took a deed to himself from the master on the certificate. Neither did he give appellant the additional contract in writing for the sale of the property named in the certificate also provided for by the agreement. According to appellant's proof, such contract was repeatedly requested of appellee, but he refused to make it. Appellee did not, however, acquire any further or greater rights than he would have obtained if he had pursued the course agreed upon in every respect. The agreement which was executed and is hereinabove set forth, did not provide who should sell the property, but as appellee had title, and as the agreement was merely that the property should be sold, obviously either party could sell the property with the concurrence of the other. The additional contract was not to provide, as appellee assumed, that appellant should lose her rights in case she did not sell the property within six months. Appellee has, since getting the title, mortgaged the property, but the mortgagee is not a party to this suit and his rights can not be affected.

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We are of opinion that appellant is entitled to the enforcement of the written contract mentioned in her bill and above set forth, under her prayer for general relief. The decree will therefore be reversed and the cause remanded, with directions to the court below to enter a decree for the sale of the property subject to the mortgage to Gray, if still unpaid; to state an account between appellant and appellee, crediting appellee with the amount he paid for the deed to the property, and all subsequent, reasonable expenditures in caring for and improving the same, with interest thereon at the rate of five per cent per annum from date of the expenditure; to charge appellee with all rents and royalties received, with interest from date of receipt at the same rate and with the amount due on the Gray mortgage on the day of sale. Out of the proceeds of sale the court will order to be paid such amount as may be found due to either party upon an account stated and proved in the manner above directed, and divide the balance, if any, between appellant and appellee.

Joel W. Hopkins v. Nelson Cofoid et al.

1. *PRACTICE—Determining the Legal Effect of Court's Action on a Certain Day.*—Where a decree is followed by other orders the same day, all are to be construed together in determining the legal effect of the court's action on that day.

2. *SAME—Cross-Bill—Foreclosure.*—The day before a foreclosure decree a defendant, who was a judgment creditor of the mortgagors, filed a bill attacking a deed by the mortgagors to their son, as fraudulent. The decree found said son the owner of the equity of redemption, but based no directions upon that finding, and only ordered the surplus brought into court. The same day the court denied a motion to strike the cross-bill from the files, and ruled defendants to answer it by the next term. *Held*, that the cross-bill was not barred by the decree; that the determination that the son was the owner of the equity of redemption was only as to the issues previously made up, and that the meaning of the entire proceedings of that day was to permit the issue as to the validity of the deed as between the judgment creditor and the son, to be afterward determined, and the surplus disposed of accordingly.

3. **HOMESTEAD—Where Right Does Not Extend Beyond Tract upon Which Home Buildings Are Erected.**—If the forty-acre tract upon which the home buildings are situated is worth \$1,000, the right of the homestead does not extend beyond that tract.

4. **SAME—Insufficient Allegations to Treat Surplus After Sale of Homestead as the Avails of a Homestead.**—Where, in a foreclosure suit, a tract of 100 acres, composed of two forty-acre tracts and parts of two other forties, was sold for \$3,000, and there was a surplus arising from said sale which was claimed by a subsequent judgment lienor, and the answer averred the premises were homestead, and the proof showed the homestead was somewhere upon said 100 acres, but the proof did not show, nor the answer aver, upon which forty it was located. *held*, there was neither averment nor proof under which said surplus could be treated as the avails of a homestead.

Bill to Foreclose Mortgage.—Appeal from the Circuit Court of Putnam County; the Hon. LESLIE D. PUTERBAUGH, Judge presiding. Heard in this court at the April term, 1902. Reversed and remanded, with directions. Opinion filed July 18, 1902.

FRED T. BEERS, attorney for appellant.

BARNES & MAGOON, attorneys for appellees.

MR. JUSTICE DIBELL delivered the opinion of the court.

In a certain consolidated foreclosure suit against Nelson Cofoid and Elizabeth Alpharetta Cofoid, his wife, a decree of sale was rendered June 12, 1900, under which a sale was had, and after satisfying the mortgages foreclosed and the costs, the master reported a surplus, which was afterward reduced to \$479.15. On June 11, 1900, the day before said decree, Joel W. Hopkins, a judgment creditor of Nelson Cofoid and wife, and a defendant in said consolidated foreclosure suit, filed a cross-bill therein, alleging that a certain deed of the mortgaged lands by said mortgagors and judgment debtors, Nelson Cofoid and wife, to their son, Harry H. Cofoid (herein called Harry for brevity), was without a *bona fide* consideration and was fraudulent as to creditors, and asking that the rights of Harry in said lands be decreed to be subject to his judgment lien. Afterward another foreclosure suit was brought against Nelson Cofoid and wife by the Peru State Bank, and the Hopkins cross-bill was consolidated therewith by agreement. The bank had

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a decree for the sale of other lands, not included in said former foreclosure decree but included in the deed to Harry. A sale under that decree and payment of the mortgage debt and costs, left a surplus of \$311.60 arising from that foreclosure. In that Peru bank case Hopkins filed another cross-bill attacking said deed to Harry in like terms. The three Cofoids seem to have assumed Hopkins had three cross-bills, one in each of the two cases originally consolidated, and one in the Peru bank case, and they filed a joint answer to the Hopkins cross-bill in each of said three cases, each denying fraud and setting up what was claimed to be a valuable consideration. Thereupon the Hopkins cross-bills were heard, all the pleadings and proofs and masters' reports in all the prior cases being used in evidence by agreement. The court, on October 30, 1901, determined that Hopkins was barred by the decree of June 12, 1900, and directed said surplus sums paid to Harry as the owner of the equity of redemption. It is proper to say that the decrees of June 12, 1900, and October 30, 1901, were not by the same chancellor. This is an appeal by Hopkins from the decree of October 30, 1901, disposing of the two surplus sums arising from said two foreclosures.

The first question is whether the decree of June 12, 1900, was a bar to Hopkins' efforts to show that the deed to Harry was in fraud of creditors, and that his judgment should be paid out of the surplus notwithstanding said deed. The Ream foreclosure suit came first, with several cross-bills to foreclose mortgages. In that case there was no cross-bill attacking the deed to Harry, or raising any issue upon it. That case was referred to Casson as master to report proofs and conclusions. He reported the proofs and recommended a decree for the sale of the premises, for the payment of the mortgages and costs, and that the surplus be brought into court to await its further order. Said report gave the dates and amounts of the several judgments, including that of Hopkins, but made no recommendation as to their payment. Hopkins filed objections to this report, because the master failed to find that Harry had no

equity in the lands involved in that case. The three Cofoids filed objections because the master failed to find that Harry was the owner subject to certain incumbrances, and because the master should have recommended that the surplus be paid to Harry. These objections were overruled, and Hopkins renewed them as exceptions to the report. The Dick (or Skeel, executor,) foreclosure came next, with several cross-bills. One cross-bill was by Daill. Nelson Cofoid and wife had given Casson a mortgage and he had assigned the mortgage and the note secured thereby to Daill. Thereafter Casson, apparently forgetting the assignment and thinking the debt was paid, released the mortgage on the record. This let in the deed to Harry ahead of said released mortgage. The deed to Harry expressed that it was subject to all liens against the lands by mortgage or otherwise which Harry should pay, but this meant existing liens and not liens which had been released of record. Daill's cross-bill sought to set aside the release and restore his mortgage, and attacked the deed to Harry as in fraud of creditors. The Cofoids answered, denying the deed was fraudulent. Hopkins answered, admitting it. This Dick (or Skeel) case was referred to Patterson as special master to take and report the proofs, which he did, without conclusions. The causes were then consolidated and heard and the decree of June 12, 1900, rendered.

In the "finding" part of the decree it was found that the report of the master in the Ream case should be overruled as to the liens of the judgments of Hopkins and certain others "as against the rights and interests of the defendant Harry H. Cofoid." This was without force and meaning, for the master had made no finding at all as between the lien of Hopkins' judgment and the rights of Harry, but had merely recommended that the surplus, after paying the mortgages and costs, be brought into court. The court in effect sustained the Daill cross-bill by giving him a lien subject only to certain prior incumbrances, but superior to all other defendants, which included Harry; but the proofs tend to show this was by agreement, and that

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the Cofoids surrendered to the Daill cross-bill, and agreed that the decree give Daill's released mortgage the preference over the deed to Harry. The court found that Nelson Cofoid and wife conveyed the premises to Harry, and that the latter took title, and is the owner of the equity of redemption in the premises, subject only to the mortgage liens; and that at the execution and delivery of said deed to him, he executed and delivered to his mother notes for \$4,000, and executed a mortgage upon said premises to his father to secure them. The court, however, did not follow up this finding of fact by a decree to pay to Harry the surplus left after the mortgages and costs had been satisfied, or to pay it to his mother, but only directed that the master bring the surplus into court to abide its further order, which was just as Master Casson had recommended. Nothing was decreed by reason of said finding. The findings are but a preservation of the evidence. There must be some decree based upon them before any one is bound.

But that was not all the court did in said consolidated cause on the day of that decree. As already seen, when the consolidated cause was heard, there was no pleading presenting for litigation the validity of the deed to Harry, except the Daill cross-bill, and that was practically sustained by the court, for his mortgage was restored as against the deed to Harry filed for record after the Casson (Daill) mortgage had been released, which could not have been done if Harry had been treated by the court as a purchaser in good faith for a valuable consideration. If this was done by consent of the Cofoids, it was none the less the substantial accomplishment of the purposes of the Daill cross-bill. Hopkins' objections and exceptions to the report of Master Casson were properly overruled, because when the consolidated cause was heard, which was a long time before the decree was entered, Hopkins had no pleading which raised any such issue. But the day before the decree of June 12th, Hopkins filed a cross-bill attacking the deed and raising the issues of its validity between himself and Harry, and entered his motion for a rule on the Cofoids to answer it.

On the day the decree was entered the Cofoids moved to strike the cross-bill from the files. The court denied that motion and ruled the defendants to answer the cross-bill by the first day of the next term. This order appears to have been made on June 12th, as it is preceded and followed in the record by other motions and orders on that date. Though this order is not attached to the decree, all are parts of what the court did in that cause on that day, and have the same effect as if all entered in the formal decree. If the finding of fact that Harry was the owner of the equity of redemption, subject only to the mortgages, is construed as barring Hopkins, then it was a mere mockery to enter the further order refusing to strike his cross-bill from the files and ruling defendants to answer his allegations that the deed to Harry was a fraud upon Hopkins. The court will not readily adopt such a construction. When all the orders of that day are construed together, their meaning appears to be, first, that Daill's cross-bill was well taken so far as his own interests were concerned, but that his allegation of fraud could not avail other defendants who had not filed a cross-bill attacking the deed; second, that as to all issues which had been raised by pleadings filed before the hearing, Harry owned the equity of redemption, except as to the mortgages, but that the Hopkins cross-bill should remain upon the files and the Cofoids should answer it, and an issue should be thus raised between them as to the validity of the deed, as against the rights of Hopkins, and that that issue should thereafter be tried in that cause at the next term or later, and that the surplus should be brought into court to await the trial of that issue. The directions to bring the surplus into court is consistent with that construction, while if the decree had been intended as a bar against Hopkins it would naturally have directed that the surplus be paid to Harry, and that Hopkins' cross-bill be stricken from the files. The refusal to strike the cross-bill from the files was equivalent to leave to file it, if leave were necessary, because presented after the hearing. The reason why the court did not, by its decree of June 12th,

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direct that the surplus be paid to Harry was obviously because there had been a cross-bill filed the day before which disputed his right thereto, which cross-bill the court determined should be answered, and an issue made up on that subject between Hopkins and Harry, and tried thereafter, the decision of which issue would determine to whom the surplus should be paid. The result of appellees' contention would be to hold that the chancellor said to the parties by the decree and orders of June 12th:

"I conclusively decree that Harry owns the equity of redemption and the right to any surplus as against all parties to this suit, but I will permit defendant Hopkins to amuse himself by a futile attempt to further litigate said question with Harry at the next term."

The court did not mean that. It meant Harry was the owner by virtue of his deed, as the pleadings stood at the hearing, except as to Daill, but that Harry's rights as between him and Hopkins should be determined under the cross-bill just filed, which the court ruled the Cofoids to answer by the first day of the next term. When all the orders of June 12, 1900, are considered in their relation to the issues theretofore litigated, and to the known fact of the filing of this cross-bill, and its recognition by the court, we conclude no bar was intended or erected, and that that decree was not a bar to relief to Hopkins under his cross-bills.

Was the deed made to defraud the creditors of Nelson Cofoid and wife, and especially Hopkins? The proof warrants the conclusion that it was. Nelson Cofoid and his wife had given numerous mortgages upon their lands, and were heavily indebted outside the mortgages. Nelson Cofoid testified that these were his debts and not his wife's, but as early as 1883 she became liable with him upon the Dick note and mortgage, and she was a signer with him as an apparent joint maker upon much of his other paper in evidence. When this deed to Harry was executed Hopkins had brought an action at law against Nelson Cofoid and his wife, and had got service upon Nelson and was about to take judgment against Nelson, and did so about

four days later, bringing in Mrs. Cofoid by *scire facias* at another term. Harry was a young man, married, living away from his father's home, on a small salary, not intending to go into the farming business, and having no capital with which to purchase this farm of about 320 acres. Harry was called as a witness by those who were opposing his deed. We have read his examination as given in full in the record, as well also as that of his father. Harry's usual answer was either that he did not remember or that he refused to answer. It is clear that Harry knew nothing about the transaction except that a deed of all the land had been made to him, and he had executed some notes for an unknown amount, and a mortgage, and turned them all over to his mother to save her from his father's debts. He could give no details except when his own counsel put them into his mouth by leading questions. The father claimed he owed Harry \$900 or \$1,000 for borrowed money, and this deed was also to pay that. Yet the son could not name a single date or item of this supposed debt, and the only note ever given between them the son still retained. Harry had received money in Chicago for stock and produce sold from the farm, and doubtless money had sometimes passed between father and son, but we think it evident the father did not owe his son, except upon the unsurrendered note. But, further, the answers filed by the Cofoids to the Hopkins cross-bills do not, any of them, set up any such consideration, or any debt from Nelson to Harry paid by this deed. Those answers state that the consideration was that Mrs. Cofoid had a valid and existing claim against her husband for \$4,000, and in consideration thereof Cofoid sold the lands to Harry, and Harry assumed and agreed to pay said debt, and executed his notes to himself for that sum, and a mortgage securing them upon said lands, and assigned said notes to his mother in payment of her husband's liability to her. They stated no other consideration. Nelson testified his wife owned an undivided half of a hundred-acre tract included in some of these mortgages, and that he owed her because she had mortgaged her land

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for his debts. But it will be noted that she does not ask to have her mortgage enforced and the surplus paid to her thereon. No attempt was made to have that done in the court below. The reason for this omission is obvious. Mrs. Cofoid is a defendant in Hopkins' judgment. If she were awarded the surplus under her mortgage it would at once be applied by the court upon the judgment Hopkins has against her. Hence the effort of the entire family here is to have it paid to Harry, regardless of the mortgage he has given, though Harry has never paid anything for the land. It is worthy of note that the theory of the consideration for the deed to Harry and mortgage and notes back by him on October 21, 1897, contained in the answers of all the Cofoids to the Hopkins cross-bill, differs entirely from that previously stated by said parties in former pleadings in the cause. In Harry's answer filed March 10, 1898, to the Dick foreclosure bill, he set out in detail that on said October 21, 1897, his father, Nelson Cofoid, owed him, Harry, \$4,000, and to secure the same signed and delivered his mortgage upon the lands in question, which was duly recorded and became a first lien, etc. On October 26, 1898, the answer of all the Cofoids to Daill's cross-bill was filed, in which they mention "the mortgage coming due from Nelson and Elizabeth Cofoid to the said Harry H. Cofoid," and state when it was made, and that it was given to secure an honest and valid debt, etc. In the answer of all the Cofoids to the cross-bill of Jones and Hutchins filed October 31, 1898, they "hereby expressly set up the mortgage of these, Nelson and Elizabeth A. Cofoid, to the said Harry H. Cofoid, as set up in the answer of the said Harry herein filed to the original bill," and averred it was a valid and subsisting lien, etc. These pleadings, filed from March 10, 1898, to October 31, 1898, from five months to a year after the deed to Harry was made, when the transaction was fresh in the minds of all parties, shows that it was then intended to support the transaction upon the theory that Nelson owed his son \$4,000, and that the transaction of October 21, 1897 (the date of the deed to Harry and mort-

gage back), was intended as mere security to Harry for that debt of \$4,000. When they came to answer the Hopkins cross-bill in May, 1901, they had entirely changed their theory, had abandoned their theory of a debt from Nelson to Harry secured by the deed, and had substituted a debt from Nelson to his wife, assumed by Harry, as the consideration for this deed. But the debt is still \$4,000. This unexplained change of base tends to characterize both theories as unreal and fictitious. The testimony given by Harry and his father might be discussed at much length, but we think it unnecessary. We are of opinion Harry has no title to the surplus which should be permitted to prevail in a court of equity, as against Hopkins' judgment.

The answers say the lands conveyed to Harry were the homestead of Nelson Cofoid and his wife. It is not in fraud of creditors to convey even as a gift the homestead estate of \$1,000 in value. But this land, located in nine different forty-acre tracts in three different sections, could not all be homestead, and the answers do not designate which tract was the homestead. If the particular forty-acre tract upon which the home dwelling was located was worth \$1,000, the right of homestead did not extend beyond that tract. *Miller v. McAlister*, 197 Ill. 72. There was therefore no allegation in the answer showing that the conveyance of some particular part of this farm was not fraudulent as to creditors because it was the homestead. As allegations and proofs must correspond, the defense of homestead, if proven, could not prevail. But the proof on that subject was only that a certain one-hundred-acre tract was the homestead. That tract was the south five-eighths of the west half of the northeast quarter of section eleven, and the south five-eighths of the east half of the northwest quarter of the same section. In other words, it consisted of two forties, and of two tracts of ten acres each, off the south side of two other forties. The one hundred acres sold at the master's sale for \$6,000, so the homestead apparently could not have extended beyond a forty. If the dwelling was in fact upon one of

the ten-acre tracts, and it was worth \$1,000, the homestead would not extend beyond that ten acres, being all the land owned by the parties in that forty. A careful examination of said master's report shows that said first named surplus of \$479.15 was produced from the sale of that one hundred acres, and not from the other lands sold under the first decree. But it is impossible to know how much was derived from the sale of that which was in fact homestead, and the proper subject of a gift to the son. For lack of either definite allegation or definite proof, the record fails to show any right in Harry to retain said surplus as against Hopkins, the judgment creditor of his father and mother, because of the existence of a homestead.

Appellant has assigned errors upon other parts of this record which can not be considered upon this appeal, which is only from the decree of October 30, 1902, and therefore they will not be discussed. The decree appealed from is reversed, and the cause remanded to the court below, with directions to enter a decree in conformity with this opinion and to order the master to pay Hopkins' judgment out of said surplus. The costs of this appeal will be adjudged against the three Cofoids.

Albert N. Case et al. v. Irving J. Case et al.

1. ADMINISTRATION OF ESTATES—*Purchasing Widow's Interest in Real Estate out of Personal Estate.*—Where there are minor heirs at law, the Probate Court has no power to permit the widow's interest in the real estate to be purchased out of the personal estate, and where it is done, the adults become liable to pay the whole amount themselves, but are entitled to an equitable charge upon the land of the minors for reimbursement.

2. CONTRIBUTION—*Among Tenants in Common.*—Where a tenant in common procures the release of a widow's right of dower unassigned, and homestead, at a reasonable price, and a co-tenant in common receives the benefit of the release, the latter must contribute his proportionate share of the money necessarily paid for extinguishing the rights, and this right to compel contribution in equity for protecting

the common title, may be enforced as well against infants as against adults.

8. SOLICITORS' FEES—*Chap. 106, Sec. 40, R. S.*—*Chap. 106, Sec. 40, R. S.*, provides that in all proceedings for the partition of real estate when the rights and interests of all the parties in interest are properly set forth in the petition or bill, the court shall apportion the costs, etc. The object of this statute is to allow an apportionment of solicitors' fees against all persons in interest, only in cases where it is not necessary for the defendants or any of them to employ counsel to protect their interests in the premises.

Bill for Partition.—Appeal from the Circuit Court of Peoria County: the Hon. LESLIE D. PUTERBAUGH, Judge presiding. Heard in this court at the April term, 1902. Affirmed. Opinion filed July 18, 1902.

ARTHUR KEITHLEY, attorney for appellants.

ELLWOOD, MEEK & LOVETT, attorneys for appellees.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This is an appeal from an order refusing to allow complainant's solicitor's fee in a partition suit. Jerome H. Case died November 1, 1900, leaving surviving him a widow, four adult children and four minor grandchildren, the latter being the children of a deceased daughter. At the time of his death, deceased was the owner of some 280 acres of land in Peoria county, in which the widow had dower and homestead. There was also a will, concerning which there was some controversy, which gave the widow, who was a step-mother to deceased's children, a greater interest in the real estate than would have been cast upon her by law. Soon after the death of Jerome H. Case the adult heirs entered into a written contract with the widow, by which it was agreed that she should release her dower and homestead in said premises for the sum of \$1,900; that the supposed will should be offered for probate and probate of the same denied, and that thereupon G. L. Dunlap, who had been acting as conservator of said Jerome H. Case, should be appointed administrator of the estate; that as soon as appointed, Dunlap should pay to the widow out of the funds in his hands belonging to the estate, said sum of \$1,900. They also entered into a written bond and agree-

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ment with Dunlap by which they undertook to hold and keep him harmless from any loss occasioned by reason of his paying out said sum, and also consented that he should take, credit in his report, and charge them and the children of the deceased daughter, above mentioned, with a proportionate share of the sum so paid, in case it should become necessary for him to replace it and account for the same.

After the probate of the supposed will was denied and the widow had conveyed her interest in the estate to the heirs at law of deceased, and received the amount agreed upon from Dunlap, Albert N. Case, one of the adult heirs, filed a bill for partition, making all the other heirs parties defendant. In his bill he alleged that each of the adult heirs was seized in fee of an undivided one-fifth interest in and to said premises and each of the minors an undivided one-twentieth interest in and to the same. He also set up the release of her dower and homestead interest by the widow, but said nothing as to the manner in which the release was obtained.

A formal answer was filed by the guardian *ad litem* for the minor defendants. None of the other defendants answered but Irving J. Case, who filed an answer and afterward a cross-bill, setting up the purchase of the dower and homestead and other rights of the widow in and to said real estate, for the sum of \$1,900, the manner in which the same was paid to her and the agreement with Dunlap to keep him safe and harmless by reason of making such payment, and alleging that the purchase of the said interests of said widow were very beneficial and advantageous to the heirs of said estate, and that said grandchildren profited thereby. The cross-bill further averred that complainant therein was advised and believed that Dunlap would not be able to get credit in the Probate Court for the amount which he had paid on account of the minor grandchildren for the release of the interests of said widow, and asked that said grandchildren be required to contribute and pay on account of the purchase of the interest of said widow, one-fifth of the sum of \$1,900, paid to her. The prayer of the cross-bill

was granted, the court finding that the purchase of the interests of the widow was a valuable bargain and to the financial interest and advantage of each of the minor defendants, and that they should jointly contribute one-fifth part of said purchase money. The premises were afterward sold in partition, and out of the shares going to said minors there was paid their proportion of the amount received by the widow as aforesaid. After the order of distribution was made, the cause was referred to the master to take evidence as to the value of the services of the solicitor for complainant in the original bill, and to report whether this was a case where a solicitor's fee should be taxed as costs. The master reported that a reasonable and the usual and customary fee in that court for the services of complainant's solicitor in the case, was the sum of \$400, but that this was not a case where a solicitor's fee should be apportioned as part of the costs. The court entered a decree approving the findings of the master and refusing to tax a solicitor's fee, from which Albert N. Case appeals.

It is plain that the Probate Court had no power to permit the widow's interest in the real estate to be purchased out of the personal estate. Had all of the heirs at law been adults, it could readily have been done by unanimous consent; but there being minor grandchildren, no one could give consent for them. As the matter stood the adult heirs had made a bargain advantageous, financially, to the minor grandchildren, as well as to themselves, but the adults had become liable to pay the whole amount themselves, and there was no way of compelling the grandchildren to pay their share, unless it could be done in this suit. Under such circumstances the adults were entitled to an equitable charge upon the land of the grandchildren for reimbursement.

In *Wilton v. Tazwell*, 86 Ill. 29, it was held that where a tenant in common procures the release of a widow's right of dower unassigned, and homestead, at a reasonable price, and a co-tenant in common receives the benefit of the release, the latter must contribute his proportionate share of the money necessarily paid for extinguishing the rights.

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And in *Chesnut v. Chesnut*, 15 Ill. App. 442, it was held that this right to compel contribution in equity for protecting the common title, may be enforced as well against infants as against adults. The adults, therefore, who had made the payment in question, had a right to enforce contribution against the minor grandchildren, but this right was not sought to be enforced by the original bill for partition filed by appellant.

The statute provides that "in all proceedings for the partition of real estate, when the rights and interests of all the parties in interest are properly set forth in the petition or bill, the court shall apportion the costs," etc. (Rev. Stat., Chap. 106, Sec. 40.) The object of this statute is to allow an apportionment of solicitor's fees against all persons in interest, only in cases where it is not necessary for the defendants or any of them to employ counsel to protect their interests in the premises. *Habberton v. Habberton*, 156 Ill. 444.

In this case the interests of the parties were not properly set forth and it was necessary for the defendants to employ counsel to file a cross-bill to enforce the equitable lien, which had not been set out in the bill.

Complainant in the cross-bill, *Irving J. Case*, could not, therefore, properly be compelled to contribute to the payment of appellants' solicitor's fees. As the apportionment of the solicitor's fees is a statutory matter and there is no provision in the statute for apportioning the same among some of the parties, while others are not charged therewith, the action of the court in wholly refusing to allow or apportion such fees in this case was entirely proper. The decree of the court below is accordingly affirmed.

T. B. Johnston v. S. M. Miller.

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114	84

1. PRACTICE—*Where Finding of Court Will Not Be Disturbed.*—The finding of the trial court will not be disturbed because of any question as to the competency of certain items of proof, where the competent proof warranted the finding.

Assumpsit, for a breach of a written contract. Appeal from the Circuit Court of Peoria County; the Hon. LESLIE D. PUTERBAUGH, Judge presiding. Heard in this court at the April term, 1902. Affirmed. Opinion filed July 18, 1902.

J. A. CAMERON and A. KEITHLEY, attorneys for appellant.

ELLWOOD, MEEK & LOVETT and BARNES & MAGOON, attorneys for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

Miller sued Johnston for damages for breach of a written contract, and upon a trial without a jury there was a finding for Miller, assessing his damages at \$400, upon which he had judgment, and Johnston appeals.

Johnston had two tracts of timber land, embracing some 320 acres, and Miller had a portable saw mill, then located several miles distant. The contract provided that the mill should be moved to and set up on Johnston's land at the joint expense of both parties; that Johnston should furnish the timber on the skids at the mill and Miller should saw it at certain agreed rates, and Johnston should take the lumber away from the mill. The mill was so moved and set up, and Johnston hauled some logs to the mill, and Miller sawed them. It is clear Johnston ceased to deliver logs at the mill and thus broke the contract, and refused to deliver more logs, and declared the contract rescinded. The proof showed what profit per 1,000 feet there was in the business for Miller, and how much lumber, approximately, could have been sawed from the trees fit for sawing on the two tracts, and the proof on that subject warranted the assessment of the damages awarded by the court. The contract required Miller to run his mill to the best advantage to hurry the lumber out, and Johnston claims Miller did not fulfill this part of the agreement, and thus was guilty of the first breach and therefore can not recover. We are satisfied that the court was warranted in finding that there was no unreasonable delay except that arising from a lack of logs placed upon the skids at the mill. The main question is whether the duty to deliver the logs upon the skids

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at the mill had been cast upon Miller by a subsequent contract.

After work under the contract sued upon had been in progress a short time the parties had several meetings relative to making another and different contract. Miller's family lived some distance away, and Johnston was complaining because lumber was not got out faster. It was proposed that Johnston should let Miller put up a shanty on Johnston's land till Miller could get a house, and should let Miller have some land for a garden, and Miller instead of Johnston should haul the logs, and Miller should be paid extra for that work a price fixed first at \$1, and afterward at \$1.50 per thousand feet. Other items of the new contract were discussed orally by the parties, and apparently they agreed. But it is clear both parties understood the contract was not to be binding till reduced to writing and signed by each party. Each prepared a new contract as he understood it was to be, and the two papers did not agree in various details, and neither party would sign the contract prepared by the other, and no new contract was signed. While the negotiations were being had some things were done pursuant to what it was understood the new contract was to be. Miller erected a shanty on Johnston's land and moved his family there, and hauled a few logs to the mill. When Miller found he and Johnston could not agree as to the terms of the new contract, he refused further efforts in that direction and declared his purpose to abide by the original contract. Johnston refused to haul the logs as that contract required, and declared the contract rescinded. While the parties orally agreed upon many of the details which were to enter into a new contract, yet they never agreed upon all of them, but disagreed upon some of them as soon as an attempt was made to express them in writing. The minds of the parties never met upon all the details of the proposed new contract, and no contract was made. It is argued by Johnston that they did orally agree that Miller should haul the logs and be paid therefor \$1.50 per thousand feet, and that the other

details were unimportant. The proof warrants the conclusion that the parties did not so contract, except to agree that should be one of the provisions to enter into the proposed new contract to be written and signed, and when they failed to agree on a written contract which both parties would sign, the failure covered and included not only the items upon which they disagreed but also the items upon which they were agreed. The new contract was to be an entirety and it was not made.

The contract in suit provided that Johnston should "furnish all of the sawing timber on his lands salable at \$15 per thousand upon the skids at the mill," and that "the price for sawing should be \$5 per thousand for first and second, and common from one by six, and larger culls \$2.50 per thousand, and mill culls nothing." Johnston argues here that these provisions mean that Miller was only to be paid for sawing lumber worth \$15 upon the skids at the mill; and that the proof shows that there was no market for the lumber at the mill at any price, the nearest market being Peoria, fifteen miles distant, and no basis was therefore laid for the assessment of any more than nominal damages; and that the court erroneously construed said provisions to mean that Johnston was to deliver on the skids at the mill all sawing timber on his lands salable in the market where Johnston sold his lumber at \$15 per thousand. No propositions of law were presented to the trial court, and there is nothing to show what construction the trial court adopted; and for want of propositions of law no question of law as to the true meaning of the contract is presented by this record for our decision. But if the court did so hold, we think that conclusion was warranted both by the contract itself and by the course of business between the parties relative to the subject-matter of the contract, as developed in the proof. If Johnston's position here is correct, the result would be that as the lumber had no market value on the skids at the mill, therefore Miller agreed to do all the sawing for nothing. Neither party so intended.

C., B. & Q. R. R. Co. v. Appell

The finding of the court will not be disturbed because of any question as to the competency of certain items of proof, for the reason that the competent proof warranted the finding. *Palmer v. Meriden Britannia Co.*, 188 Ill. 508. The trial court saw the witnesses. We find nothing in the record calling for a reversal.

The judgment is therefore affirmed.

Chicago, Burlington & Quincy R. R. Co. v. Charles L. Appell, Adm'r.

1. **INSTRUCTIONS—Where Case Is Close.**—Where the case is a very close one upon the facts, the instructions given the jury should be clear and explicit.

2. **SAME—Speed of Trains.**—An instruction to the effect that the ordinance introduced in evidence is a valid law of the village, and if the jury believe from the evidence in this case that the defendant was, at the time of the injury complained of, running the train that killed deceased within the corporate limits of said village at a rate of speed in excess of that allowed by said ordinance, then the law presumes that the defendant by so doing was guilty of negligence and liable in damages for causing the death of said deceased, is erroneous, as it ignores the question whether the excessive rate of speed contributed to bring about the death of deceased, and also the vital question whether deceased was, at the time, in the exercise of ordinary care for his own safety.

3. **SAME—Burden of Proof.**—An instruction which states to the jury that the burden is upon the plaintiff to prove, by the greater weight of the evidence, not only the negligence of the defendant as charged in the declaration, but also to prove by the greater weight of the evidence that the deceased was free from negligence which contributed to the collision which caused his death, and that if they find from all the evidence in the case that the plaintiff has not so proven both of said facts, then they should find the defendant not guilty, is proper.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Peoria County; the Hon. LESLIE D. PUTERBAUGH, Judge presiding. Heard in this court at the April term, 1902. Reversed and remanded. Opinion filed July 18, 1902.

JACK & TICHENOR, attorneys for appellant.

CARL J. APPELL and ARTHUR KEITHLEY, attorneys for appellee.

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108	185
110	174

108	185
112	76

MR. JUSTICE HIGBEE delivered the opinion of the court.

This was a suit brought by appellee, as administrator of the estate of Noah A. Johnson, deceased, on behalf of the next of kin, to recover damages for the death of said Johnson, which is alleged to have been caused by the negligence of appellant. On the day of his death, Johnson was engaged in hauling corn from his uncle's farm, northwest of appellant's tracks, to an elevator located on the south-erly side of said tracks in Galva. In going to and from the farm to the elevator, Johnson crossed appellant's tracks, within the village limits, at the Bowdoin street crossing, about thirty-five rods east of the west boundary of the vil-lage. Shortly after eleven o'clock in the morning on the day in question, which was February 22, 1901, deceased was returning to the farm after delivering a load to the elevator. He drove west on Johnson street, to Bowdoin street and then turned north along the latter street to the crossing in question. It was 130 feet from the center of Johnson street where it intersects Bowdoin street to the center of appellant's tracks. At the crossing in question, appellant's tracks run southwest and northeast, the easterly track being nearest to Johnson street and the first to be crossed by deceased in the direction he was going. Some 500 feet down the track, toward the southwest, was a large house with trees and out-buildings around it which obscured the view of the track beyond, from one coming west on Johnson street and for a short distance north on Bowdoin street from the intersection of the two streets. Johnson was in a farm wagon, with the top box on it for greater capacity in hauling corn, and was standing up near the front end with the lines in his left hand. The morning was cold and clear. He had on a large ulster with the collar turned up, a muffler around the lower part of his face, and his cap was pulled down over his ears. As he approached the crossing he was apparently looking straight ahead. The engineer sounded the station whistle at the post some half a mile from the crossing and shortly after-ward shut off the steam. He first saw Johnson when the

latter was some sixty to seventy-five feet from the crossing. The danger whistle was sounded when within 150 to 200 feet of the crossing and at the same time brakes were applied and the engine reversed.

It is uncertain when Johnson first saw the train, but it was evidently about the time the danger signal was given. When he observed it he was apparently bewildered. He at first started to whip his horses, with the evident intention of driving over before the train, but afterward stopped, with the team and part of the wagon on the track, and endeavored to pull his horses around so as to clear the track. The team was frightened, however, and he did not succeed in getting off the track. The engine struck the front wheel of the wagon, throwing Johnson some fifty feet and killing him instantly. It also demolished the wagon, killed one horse and injured the other. The train ran some 300 feet beyond the crossing before stopping.

There are two counts in the declaration. The first charges that the train was driven at a high and dangerous rate of speed into and within the corporate limits of the village. The other set up an ordinance prohibiting any train from running at a greater rate of speed than ten miles an hour, within the limits of the village, and alleges that the train was running at a greater rate of speed than permitted by the ordinance. The general issue was filed and there was a verdict and judgment in favor of appellee for \$2,500.

Appellant claims that the proofs show that it was not guilty of any negligence causing or contributing to bring about the death of Johnson, but that Johnson, upon the occasion when he was killed, was not in the exercise of ordinary care for his own safety. A careful consideration of the evidence leads to the conclusion that the case is a very close one upon the facts. Under such conditions the instructions given the jury should be clear and explicit.

The first instruction given for appellee was as follows:

"You are instructed that the ordinance introduced in evidence is a valid law of the village of Galva, and if you believe from the evidence in this case that the defendant was, at the time of the injury complained of, running the train

that killed Noah Johnson, within the corporate limits of said village of Galva, at a rate of speed in excess of ten miles per hour, then the law presumes that the defendant by so doing was guilty of negligence, and liable in damages for causing the death of said Noah Johnson."

This instruction did not state a correct principle of law. By it the jury were authorized to render a verdict in favor of plaintiff in case they found the defendant was, at the time in question, running its train within the corporate limits of the village at a greater rate of speed than ten miles per hour, regardless of the question whether the excessive rate of speed contributed to bring about the death of Johnson, and also of the vital question whether Johnson was, at the time, in the exercise of ordinary care for his own safety. Appellee claims that whatever error there may be in this instruction was cured by the series of instructions taken as a whole. There was no instruction, however, given for appellee which satisfactorily cured the errors of the first instruction. It is true that one instruction given for appellant told the jury that the running of appellant's train at a rate of speed in excess of the limit fixed by the ordinances of the village, only made out a *prima facie* case of liability against appellant, which might be removed or rebutted by the proof, and several of appellant's instructions told the jury that if they found that deceased, at the time in question, was not exercising reasonable care and diligence for his own safety, appellee could not recover.

There was, however, something more than a mere omission in appellee's first instruction to be cured. It told the jury plainly and positively that under a certain state of facts, appellee was entitled to recover, when in truth such condition of the facts did not of itself entitle him to a recovery. We can not say whether the jury followed this instruction, given for appellee, or the instructions which stated the law correctly, given for appellant. Under such circumstances, and particularly where the case is so close upon the facts as this one is, we must hold that the error in the instruction was not cured by the other instructions given in the case. *B. & O. S. W. R. R. Co. v. Derr*, 69 Ill. App. 180.

The People v. Jones.

Appellant also complains that the following instruction offered by it was refused :

“The court instructs the jury that the burden is upon the plaintiff to prove, by the greater weight of the evidence, not only the negligence of the defendant as charged in the declaration, but also to prove by the greater weight of the evidence that the deceased was free from negligence which contributed to the collision which caused his death, and if you find from all the evidence in the case that the plaintiff has not so proven both of said facts, then you should find the defendant not guilty.”

That this instruction stated the law correctly can not be questioned. We do not find that the principle of law sought to be presented to the jury by this instruction is fully covered by any other instruction, and appellant therefore had a right to have it go to the jury. For the errors in regard to the instructions above noted, the judgment must be reversed and the cause remanded.

The People ex rel., etc., v. DeWitt L. Jones.

1. **MANDAMUS—Duty of Judge as to Bill of Exceptions.**—The trial judge is not compelled to sign the bill of exceptions prepared by counsel. It is for him to determine the accuracy of the bill and the matters and things to be incorporated in it; he must sign such a one as he believes to be correct and none other. If he is unable to remember the testimony, it is his duty to recall the witnesses or in some other mode determine the evidence to be incorporated in the bill.

Petition for Mandamus.—Heard at the April term, 1902. Writ awarded. Opinion filed July 18, 1902.

W. O. ROBINSON, attorney for petitioner.

WHITNEY, UPTON & WHITNEY, attorneys for respondent.

MR. JUSTICE DIBELL delivered the opinion of the court.

In a case pending in the County Court of Lake County, entitled Fred Rahn v. The Oakwood Stock Farm Company, there was a jury trial, and a verdict and a judgment for

plaintiff. Defendant prayed for and obtained an order for an appeal to this court, and perfected said appeal by filing and procuring the approval of an appeal bond within the time fixed therefor. He also obtained leave to present and file a bill of exceptions, and within the time fixed therefor presented to the judge of said court a bill of exceptions, which said judge, within said time, refused to sign, but deposited it with the clerk of the court, with his refusal indorsed thereon. This is a petition wherein said defendant is the relator, asking for a writ of mandamus to compel said county judge to settle and sign the bill of exceptions. Respondent answered, the relator demurred to said answer, and the cause has been submitted upon said petition, answer and demurrer. The petition and answer largely relate to the respective versions of the parties as to what occurred at the different times when the bill of exceptions was presented to the county judge and its execution requested. There is a controversy between the parties on that subject, which we regard as largely immaterial. So far as material, the facts stated by respondent are to be treated as true, under the demurrer.

The answer shows that the time to present a bill of exceptions in said cause expired February 17, 1901; that on February 15th the relator presented to respondent a bill of exceptions in said cause for signature, and urged the judge with perhaps undue zeal to sign it; that the respondent was otherwise engaged and could not then attend to it and refused to do so; that relator's attorney, being a resident of another county and desiring to return, deposited the bill with the clerk of the court and so advised respondent; that respondent on that day marked it as presented; that on the next day, February 16th, in the absence of relator's counsel, respondent examined said bill of exceptions and found it incomplete and imperfect, and containing matters which never occurred, and respondent on that day indorsed the bill as being "incorrect, incomplete, and containing mis-statements, and not a true bill of exceptions, and refused."

The main question presented by this record is whether the fact that a bill of exceptions is incorrect is a sufficient

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excuse for a refusal to sign it, or whether it is the duty of the judge to direct such changes as he determines are necessary to make it speak the truth, and then to execute it. The question is important, because where a case is tried without a stenographer, as was apparently the case here, it must often occur that the bill of exceptions, drawn by counsel for the defeated party, will not in all respects correspond with the view taken by the trial judge of what has been done in the case. The trial judge is the one who must determine, under his official oath, what was the course of the proceeding before him, and his determination that a matter stated in the bill of exceptions did not in fact occur, or occurred in a different way from what is there stated, is conclusive. But if the trial judge may simply refuse to sign, upon finding the bill presented is imperfect, without taking any steps to cause the bill to be made correct, so that he may sign it, he can thus defeat the right of appeal, and prevent the review of his rulings which the law intends shall be given to the party aggrieved by the judgment.

In *The People ex rel. v. Williams*, 91 Ill. 87, the trial judge refused to sign a certificate of evidence because it was incorrect, but notified the counsel who presented it that if they would correct it so it would conform to the facts he would sign it. Afterward he again refused to sign it because he was not satisfied it was a true and correct transcript of the evidence. The Supreme Court held it was the duty of the trial judge, if he did not remember the evidence, to resort to a stenographic report thereof, or to recall the witnesses and examine them again, or in some other mode determine the facts to be incorporated in the certificate. In awarding a mandamus the court there further said :

“ We do not hold that the certificate of evidence prepared by petitioners and presented to the judge is the one to be signed by the respondent. We merely decide that, under the circumstances of this case, the petitioner is entitled to have a certificate of evidence signed. It is for the respondent, the judge before whom the cause was tried, to determine the accuracy of the certificate and the matters and

things to be incorporated in it. As said in *The People v. Pearson*, 2 Scam. 189, he must sign such a one as he believes to be correct, and none other."

In *The People ex rel. v. Gary*, 105 Ill. 264, the trial judge had refused to sign a bill of exceptions presented to him. He set up that he had forgotten the testimony, which had not impressed his memory because heard upon a default, and that he had no authority, in his judgment, to recall the witnesses to ascertain what their evidence was. He refused to hear said witnesses when presented before him for that purpose, and refused to sign a bill of exceptions which stated it contained all the evidence given on the trial, unless the parties would agree it was a correct statement of all the evidence. The Supreme Court held the petitioner was entitled to a bill of exceptions, and that it was the duty of the judge to recall the witnesses, or in some other mode determine the evidence to be incorporated into the bill, and that the inability of the judge to remember the testimony formed no good reason why the party should lose his right of appeal. A peremptory mandamus was awarded. Obviously it was not meant the judge should necessarily sign the particular bill which had been presented, but that he should ascertain what the evidence was, cause it to be inserted according to the fact, if not already done, and then sign the bill of exceptions so settled by him.

In *The People v. Chytraus*, 183 Ill. 190, the trial judge had stricken out of a bill of exceptions remarks made by counsel for and against a certain motion, and remarks made by the judge in deciding the motion, and had then signed the bill. Mandamus was brought to compel him to sign a bill containing the statements stricken out. Respondent answered that he struck out the statements because he understood they were no proper part of the bill. It was there said :

"The judge must determine judicially, in the first instance, what the bill of exceptions shall contain, that it may truly and fairly present the facts and rulings occurring on the trial of the cause. 'It is well settled' mandamus will lie to compel a judge to sign and seal a bill of excep-

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tions in a cause tried before him, but he must at last determine the accuracy of the bill which he verifies.' ”

It was also held the judge acted properly in striking out the remarks of counsel and court.

In *The People v. Holdom*, 193 Ill. 319, the trial judge declined to examine or pass upon a bill of exceptions in a criminal case until it was approved by the state's attorney; and in answer to a petition for a writ of mandamus to compel him to sign it, he set up that the bill presented was not sworn to, that there was no official reporter, and he did not know or remember whether the matters set forth in the bill were correctly stated. The Supreme Court pointed out the methods to which the trial judge could resort in order to advise himself of the truth and correctness of the bill of exceptions which he signs, and indicated it was his duty “to direct the proper preparation of the bill.” In awarding the writ the court further said :

“We do not desire to be understood as requiring respondent to approve the particular bill of exceptions presented to him in the exact condition as presented, but it was and is his duty to examine it and to point out where the inaccuracies are and what corrections should be made; and when the bill, in his judgment, truly sets forth the proceedings and the evidence, it is his duty to sign and seal the same.”

We regard the foregoing cases as decisive of respondent's duty in this case.

But respondent further stated in his answer that this bill of exceptions could not be modified or made correct without being entirely rewritten. This was not a statement of a fact, but of a matter of opinion. The relator filed with his petition what he averred was an exact copy of the bill of exceptions which respondent refused to sign. Respondent in his answer denied it was an exact copy of the bill he refused to sign, but did not state in what respect it was not an exact copy. We take this as an admission the copy filed in this cause is a substantial copy of the bill tendered to respondent and which he refused to sign. It is short, and if inaccurate can not be difficult to correct. It sets out a motion by defendant for a continuance or postponement, an

affidavit in support thereof, the denial of the motion, and an exception by defendant. If any part of this did not occur, the judge can order the incorrect part stricken out or amended. Next is a short statement of what occurred during the impanelment of the jury, not covering the examination of the jurors, but relating to the manner in which the panel was filled for the trial of the case. If this is incorrect or incomplete we fail to see how there can be any difficulty in the trial judge directing such changes as will make it correct. Then follows a remark the judge is said to have made in the presence of the jury in ruling upon the objections to the panel. Respondent answers that he made no such remark. If he so determines, he should order that statement stricken out. There follows a brief statement of the evidence, given by plaintiff and his two sons, and a single item of testimony by defendant's attorney, and certain checks. The proof was evidently brief. Defendant offered no witness except his attorney on a question of signature. No exception is preserved to any ruling of the court upon the evidence. The suit was for wages earned by plaintiff's sons while minors. Defendant did not deny the services but introduced checks he had paid the sons, and sought to show by cross-examination of plaintiff and his sons that plaintiff had permitted his sons to receive their wages, etc., and so was bound by payments to them. If the evidence in the bill of exceptions is not sufficiently full or correct it can not be difficult to direct the necessary additions or changes. Next follows two instructions given for plaintiff and one modified and given for defendant and one for defendant refused, without any exceptions to the rulings of the court upon them. The bill next contains a written motion for a new trial, its denial and an exception, and the certificate to the bill. The whole bill covers but twelve pages, and the only exceptions it contains are to denying the motion for a continuance, to the rulings of the court upon objections of defendant to the manner in which the jury were brought into the box, including said remark by the judge in so ruling, and to the denial of the motion

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for a new trial. A simpler bill of exceptions could hardly be found. The trial judge is not required to do the clerical work, but he can and should call the parties before him, direct the changes to make the bill truly show what was done before him, and when the changes have been made, and the bill so settled by him, sign and seal the same and deliver it to the clerk to be filed. It is also urged that the attorney for relator should have again appeared before respondent and again requested him to settle and sign the bill, before resorting to mandamus. That might be true if respondent had only marked the bill "presented," but when he also indorsed upon the bill his refusal to sign it, there was nothing further the attorney was required to do. A writ of mandamus will therefore be awarded.

Mary A. Kane v. City of Joliet.

1. **VARIANCE**—*Between Allegations and Proof.*—A declaration which confines plaintiff's cause of action to injuries received from falling into an excavation is not supported by evidence that the improvement had been completed and that plaintiff had fallen down a flight of steps in the sidewalk.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Will County; the Hon. ROBERT W. HILSCHER, Judge presiding. Heard in this court at the April term, 1902. Affirmed. Opinion filed July 18, 1902.

J. W. DOWNEY, attorney for appellant.

LOUIS LAGGER, attorney for appellee.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

Mrs. Mary A. Kane sued the city of Joliet for personal injuries claimed to have been received by her by falling in an excavation in a sidewalk on the east side of Chicago street in said city, not less than five nor more than fifty feet north of the north line of Marion street. Both by the declaration and the bill of particulars, plaintiff's cause of

action was confined to falling into an excavation at that place. She recovered a verdict of one dollar. Judgment was entered in her favor on the verdict and she appealed.

In order to reverse we must be able to say that a verdict for plaintiff was warranted and that it should have been for substantial damages.

At the point in question, in front of the corner lot owned by Mrs. Bean, the said walk was cut down to a new grade, about twenty-five or twenty-seven inches below the old grade, and a new walk was put in and steps leading down from the higher to the lower level were put in the width of the walk. In the bottom of this excavation cinders were placed and then a stone walk on the cinders.

Plaintiff's theory is, that she was passing south on that side of the street, in the evening, with the street insufficiently lighted, and that there was no barrier where this excavation had been cut down. Defendant's proof is that a barrier was erected there each night while the improvement was going on and until the steps were put in and the walk laid, which was only three or four days; that this barrier was four feet high, and Mrs. Kane came there after the work was completed, and, not noticing the steps and the cut, simply walked ahead as if the sidewalk were on the level, and thus fell. We think the preponderance of the credible testimony supports defendant's claim. At any rate we can not say plaintiff's claim is supported by a preponderance of the proof. The only eye witness of the fall says the walk was finished and the steps there when the plaintiff fell. If she fell after the improvement was completed, then she did not fall into an excavation and can not recover under this declaration and bill of particulars. The only serious injury plaintiff has, according to her physicians, is a rupture in the groin. The preponderance of the credible testimony is that this rupture was not caused by this fall but was received at a later date. At any rate we can not say that the evidence so preponderates in favor of the plaintiff on that subject that the jury ought to have awarded substantial damages. The judgment of the court below is affirmed.

Armour Packing Co. v. Hans N. Sjogren.

1. **ATTACHMENT—*Trial of Right of Property.***—The statute provides that when personal property is taken on execution or attachment issued by a justice of the peace, and such property is claimed by a person other than the defendant therein, and such claimant shall give notice in writing to the constable, of his claim to such property, the constable shall notify the plaintiff in such writ, or his agent or attorney, of such claim, and shall also notify such plaintiff and the claimant before what justice and at what time and place a trial of the right of such property will be had.

2. **SAME—*Where Trial of Right of Property Shall, Be Had.***—The trial of the right of property in such cases shall be before the justice of the peace who issued such writ, if he reside in the county, or if he shall be unable to attend such trial, before some other justice of the peace in such county, or before some justice of the peace in the county where the levy was made, in case the writ was issued from another county.

3. **SAME—*Mortgagee a Claimant.***—The mortgagee is a claimant of the property within the terms of the statute and has an undoubted right to institute this form of proceeding.

Attachment.—Appeal from the Circuit Court of Rock Island County; the Hon. FRANK D. RAMSAY, Judge presiding. Heard in this court at the April term, 1902. Affirmed. Opinion filed July 18, 1902.

WOOD & PEEK, attorneys for appellant.

PETER R. INGELSON, attorney for appellee.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

November 20, 1900, the Armour Packing Company sued out a writ of attachment before a justice of the peace of Rock Island county against Charles B. Freeberg and seized certain personal property in controversy in this suit. November 13, 1900, Freeberg executed a chattel mortgage upon the same property to the appellee, Hans N. Sjogren. While the property was held upon the attachment writ Sjogren instituted proceedings before the said justice for a trial of right of property. The trial resulted in favor of the Armour Packing Company. Sjogren appealed the case to the Circuit Court where a trial by jury resulted in a verdict in his favor and after a motion for a new trial was

overruled a judgment was entered releasing the property from the levy of attachment by the Armour Packing Company. Appeal is prosecuted to this court to reverse the judgment of the Circuit Court.

It is urged that the statute providing for this summary trial of right of property was not intended for the benefit of a mortgagee. This question was not raised on the trial in the Circuit Court. Its only possible suggestion was the objection to the introduction of the chattel mortgage in evidence. This was not sufficient to raise the question of jurisdiction. Moreover the overruling of the motion for a new trial is not assigned for error. Again, under the provisions of the chattel mortgage the seizure of the goods on the attachment writ authorized the mortgagee to declare the debt due and take possession of the property. The statute provides:

“When personal property is taken on execution or attachment issued by a justice of the peace, and such property is claimed by a person other than the defendant therein, and such claimant shall give notice in writing to the constable, of his claim to such property, the constable shall notify the plaintiff in such writ, or his agent or attorney, of such claim, and shall also notify such plaintiff and the claimant before what justice and at what time and place a trial of the right of such property will be had.

The trial of the right of property in such cases shall be before the justice of the peace who issued such writ, if he reside in the county, or if he should be unable to attend such trial, before some other justice of the peace in such county, or before some justice of the peace in the county where the levy is made, in case the writ was issued from another county.

The justice shall enter such cases on his docket, and the trial shall be had therein in the same manner as in other trials before justices of the peace. A change of venue may be taken as in other cases.

In case the property shall appear to belong to the claimant, judgment shall be entered against the plaintiff in the execution or attachment for costs, and the property levied upon shall be released.”

The statute is clear. There can be no question of construction. The mortgagee was a claimant of the property

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within the terms of the statute and had an undoubted right to institute this form of proceeding.

If the appellant is left in a more unfortunate situation than it would have been had replevin been instituted instead of the form of procedure adopted, its remedy is legislative, not judicial.

It is urged this is not a judicial proceeding and the judgment binds no one. That question is not presented by this record. The statute authorizes this appeal and the only question before us is whether the judgment of the Circuit Court shall be reversed or affirmed. If the parties shall undertake to act in disregard of this proceeding the question may then arise whether this is a judicial proceeding which binds the parties.

It is argued that the note secured by the chattel mortgage was without consideration and fraudulent, and that the mortgage was executed to hinder, defraud and delay creditors. There is a sharp conflict in the evidence on this question of fact. There is proof tending to establish facts which are badges of fraud and other proof denying the existence of such facts. We would not, however, be warranted in disturbing the conclusions of facts reached by the jury and approved by the trial judge. They saw the witnesses and had superior opportunities of determining their credibility. Moreover, the overruling of the motion for a new trial is not assigned for error.

There is no error in the giving, refusing or modifying of instructions or in the admission or rejection of testimony. The record being free from error the judgment of the Circuit Court will be affirmed.

Julia Boyd, Adm'x, etc., v. The Chicago, Burlington & Quincy R. R. Co.

1. CITIES AND VILLAGES—*General Act for Incorporation—Passage of Ordinances.*—By virtue of section 13, article 3 of the general act, the yeas and nays are required to be taken upon the passage of an ordinance, and to be entered upon the journal.

2. *SAME—Not Organized Under the General Act.*—A city council of a city not organized under the general act is governed by the rules it has established for the conduct of business by the city council.

8. *EVIDENCE—Copies of Ordinances.*—Under our statutes relative to evidence, copies of ordinances and council proceedings certified by the clerk are made competent proof.

4. *SAME—Non-Existence of Fact or Record.*—There is no statute authorizing the city clerk to create proof of the non-existence of any fact or record by his official certificate. Such negative proof requires oral testimony, under oath, of a search made and its result.

5. *DECLARATION—Allegation of Negligence.*—A count which avers that defendant then and there by its servants so carelessly and improperly drove and managed the said locomotive and engine and train of cars that by and through the negligence and improper conduct of the defendant, by its said servants in that behalf, the said locomotive engine and train of cars then and there ran and struck with great force and violence upon and against the said horses, wagon, and the said decedent, and thereby the said decedent was then and there thrown to and upon the ground and killed by said locomotive engine and said train of cars attached thereto, is not objectionable on the ground that the allegation of negligence is too general.

6. *RAILROADS—Excessive Speed of Trains.*—In the absence of a statute or ordinance a railroad company has the undoubted right to establish the speed of its trains; but under the rule of the common law, a railroad company is required to exercise its franchise with due regard to the safety of its passengers and such persons as may travel on the highways crossing railroad tracks, and in establishing the rate of speed that their trains may be run, due regard must be had not only to the safety of passengers, but also to the safety of all persons, in the exercise of ordinary care, traveling on the highways over and across railroad tracks.

7. *SAME—High Speed Not Negligence as a Matter of Law.*—High speed is not negligence as a matter of law, but the jury may properly find it negligence as a matter of fact.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Kendall County; the Hon. HENRY B. WILLIS, Judge presiding. Heard in this court at the April term, 1902. Reversed and remanded. Opinion filed July 18, 1902.

MCDougall & Chapman, attorneys for appellant.

ALBERT J. HOPKINS, FRED A. DOLPH and ROBERT BRUCE SCOTT, attorneys for appellee; CHESTER M. DAWES, of counsel.

MR. JUSTICE DIBELL delivered the opinion of the court.

On May 19, 1900, John Johnson was struck and killed by

an engine drawing a freight train on the crossing of the Chicago, Burlington & Quincy Railroad over Ben street in the city of Plano. His administratrix brought this action against the railroad company to recover for the loss to his next of kin, charging the death was caused by the negligence and misconduct of the servants of the railroad company running said train. Plaintiff's declaration contained five counts. The court sustained a demurrer to the first and fourth, and plaintiff dismissed the second and third, relating to the failure to use the bell or the whistle and to the lack of a flagman, so that the case finally rested on the fifth count and a plea of not guilty. The court directed a verdict for defendant. After motion for a new trial denied and judgment, plaintiff appeals.

The fifth count charged said train was propelled at a speed forbidden by an ordinance of said city. At the trial plaintiff offered a certified copy of the ordinance so declared upon, the certificate of the city clerk stating it was passed on September 4, 1899. Defendant objected to the introduction of said ordinance, and in support of the objection offered to the court a certified copy of the record of the proceedings of the city council of said city at said meeting of September 4, 1899, which record failed to show that the yeas and nays were taken on the passing of said ordinance and entered of record upon the journal of the council proceedings, and did not show what aldermen, or how many, voted for the ordinance, but only set forth the conclusion of the clerk that it passed. Defendant also offered in evidence to the court in support of its objection, an ordinance adopted June 26, 1894, establishing rules for the conduct of business by the city council, one of which required the yeas and nays to be taken on the passage of all ordinances and to be entered on the journal of its proceedings. If on September 4, 1899, the city of Plano was organized under the general act for the incorporation of cities and villages, then, by virtue of section 13 of article 3 of said general act, the yeas and nays were required to be taken upon the passage of the ordinance of that date, and to be entered upon the

journal. If the city was not under the general act, its council was governed by the rules above mentioned. The certificate of the clerk of the ordinance offered by plaintiff, that it was passed September 4, 1899, was *prima facie* proof sufficient to entitle it to go in evidence, but that did not preclude defendant from showing to the court by the journal that the ordinance had not, in fact, been legally adopted. *I. C. R. R. Co. v. People*, 143 Ill. 434. Defendant having shown to the court that the ordinance was not legally adopted (*Schofield v. Village of Hudson*, 56 Ill. App. 191), the court properly sustained the objection to the ordinance, and properly directed a verdict for defendant, as the ordinance was necessary to sustain the fifth count.

Before the court ruled upon the objection to plaintiff's ordinance, defendant offered to the court certified copies of certain other ordinances and proceedings, to the introduction of which due objections and exceptions by plaintiff were preserved. The certificate of the clerk was not only that they were true copies, but also that the proceedings so certified contained the only reference to certain matters in the journal of the council proceedings from 1884 to September 4, 1899. Under the general act for the incorporation of cities and villages, and under our statute relative to evidence, copies of ordinances and council proceedings, certified by the clerk, are made competent proof. But our attention is not called to any statute which authorizes the city clerk to create proof of the non-existence of any fact or record by his official certificate. Such negative proof requires oral testimony, under oath, of a search made, and its results. *Cross v. Pinckneyville Mill Co.*, 17 Ill. 54; 2 *Jones on Evidence*, section 555. In a note to 1 *Greenleaf on Evidence*, section 498, it is said that a notary's certificate that no note of a certain description was protested by him, is inadmissible. We conclude that so much of the clerk's certificate as stated what the record did not contain was incompetent, and that if the instrument had been offered to the jury it would have been error to admit it, because matters would be got before the jury by the certificate which could only

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be shown by a witness examined orally. But as this proof was only offered to the court in support of the objection to plaintiff's ordinance, no harm was done by the improper recitals of the certificate. It is not necessary to determine whether said papers last referred to tended to support defendant's objection to plaintiff's ordinance, as said objection was properly sustained on the grounds already stated.

The first count of the declaration, after proper averments as to the railroad and train and highway, and the position and due care of deceased, averred that "defendant then and there, by its servants, so carelessly and improperly drove and managed the said locomotive and engine and train of cars, that by and through the negligence and improper conduct of the defendant, by its said servants in that behalf, the said locomotive engine and train of cars then and there ran and struck with great force and violence, upon and against the said horses, wagon, and said John Johnson, and thereby the said John Johnson was then and there thrown to and upon the ground and killed by said locomotive engine with said train of cars attached thereto." The objection made to this count is that the allegation of negligence is too general. This objection is considered and overruled in *Chicago City Ry. Co. v. Jennings*, 157 Ill. 274, and we need not repeat the reasons given there nor the authorities there cited. To the same effect are *C. & A. R. R. Co. v. Redmond*, 171 Ill. 347; *Chicago General Railway Co. v. Carroll*, 189 Ill. 273, and *I. C. R. R. Co. v. Aland*, 192 Ill. 37. These authorities are decisive that the first count stated a good cause of action.

The fourth count, after stating the operation of the railroad and freight train by defendant, averred that the city of Plano was a populous city, of, to wit, two thousand inhabitants, and that it was the duty of the defendant to have driven its train through said city in such a manner and at no greater rate of speed than would reasonably be safe in a populous city like the city of Plano; but that defendant drove said engine, attached to said train, through said city and across a certain crossing of said railroad and a certain

public highway known as Ben street, in said city, in an unreasonable and negligent and improper manner, and at an unreasonable and unsafe rate of speed, and that deceased, while driving along said Ben street and across said railroad and exercising due care, was thereby struck by defendant's engine and train, driven at such unreasonable and unsafe rate of speed, and by means thereof was then and there killed. It is argued in support of the demurrer, that in the absence of municipal regulation, a railroad company may run its train through a populous city at any rate of speed it chooses, provided due regard is had to the safety of the passengers on the train. That this position is not the law, has been repeatedly announced by the Supreme Court of this State. *C. & A. R. R. Co. v. Engle*, 84 Ill. 397; *Wabash R. R. Co. v. Henks*, 91 Ill. 406; *C. & N. W. Ry. Co. v. Dunleavy*, 129 Ill. 132; *E. J. & E. Ry. Co. v. Raymond*, 148 Ill. 241; *Overtoom v. C. & E. I. R. R. Co.*, 181 Ill. 323. In *Partlow v. I. C. R. R. Co.*, 150 Ill. 321, the court said:

"In the absence of a statute or ordinance, a railroad company has the undoubted right to establish the speed of its trains; but, under the rules of the common law, a railroad company is required to exercise its franchise with due regard to the safety of its passengers and such persons as may travel on the highways crossing railroad tracks, and in establishing the rate of speed that their trains may be run, due regard must be had not only to the safety of passengers, but also to the safety of all persons, in the exercise of ordinary care, traveling on the highways over and across railroad tracks."

The expression by us in *C. & N. W. Ry. Co. v. Bunker*, 81 Ill. App. 616, is to be confined to the case then before the court, which related to the killing of live stock at a farm crossing, not in a populous city or community, and not even at a public highway crossing. In *C. & A. R. R. Co. v. Pearson*, 71 Ill. App. 622 (relating to an accident at the crossing of a railway over a village street), we said high speed was not negligence as a matter of law, but the jury might properly find it negligence as a matter of fact. The opinion of the Supreme Court in *C., B. & Q. R. Co. v. Lee*, 68 Ill. 576, does use language, on page 582, apparently sup-

porting the proposition that in the absence of municipal regulation a railroad company may adopt such rate of speed as it deems advisable, if consistent with the safety of its passengers. But upon examining the prior report of the same case in 60 Ill. 501, where the facts are stated, it will be found the court was not speaking of speed in a populous city, but at a highway crossing in the country. It is further argued that the language of the fourth count, charging negligence, is too general, and that said count does not state the facts which raise the duty therein alleged. That count does not state whether the crossing was or was not in a populous part of the city and over a much traveled street, as in the fourth count in the Raymond case, *supra*, and in the Overtown case, *supra*. It does not expressly state for whom the speed of the train was unsafe. This language, however, is no more general than like allegations in the first counts in the Dunleavy and Henks cases, *supra*. Moreover, excluding the allegations as to speed, the fourth count charges defendant drove said train over said crossing in an unreasonable and negligent and improper manner, and that plaintiff's intestate was struck and killed by means thereof, and this seems to state a cause of action under the rules laid down in the Jennings case, *supra*. The fourth count is certainly loosely drawn, and we do not commend it, but we feel compelled by the cases above cited to hold it sufficient, under the demurrer here interposed, which seems to have been oral and general only. The judgment is therefore reversed and the cause remanded.

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112	2542

**Chicago, Rock Island & Pacific Ry. Co. v. Pearl Keely,
Adm'x, etc.**

1. INSTRUCTIONS—*Harmless Error*.—An instruction to the jury that they might disregard the evidence of any witness, if they believe that the witness had sworn falsely, without also instructing them that they must also believe from the evidence that the witness had sworn falsely, is not ground for reversal, where they were repeatedly instructed that

all their conclusions of fact must be arrived at from a preponderance of the evidence.

2. *DUE CARE—Absence of Eye Witnesses.*—In suits brought to recover damages for death by accident, the plaintiff is not bound to show, by direct evidence, that the deceased was free from negligence, and where there are no eye witnesses to the killing, the fact that the deceased exercised ordinary care for his own safety at the time of the injury may be shown by circumstantial evidence, or proof of facts and circumstances from which that fact may be reasonably inferred, including the natural instinct of self-preservation.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Rock Island County; the Hon. WILLIAM H. GEST, Judge presiding. Heard in this court at the April term, 1902. *Affirmed.* Mr. Justice HIGBEE, dissenting. Opinion filed July 18, 1902.

JACKSON & HURST, attorneys for appellant.

WOOD & PEEK, attorneys for appellee.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

This case is before us a second time. Proceedings upon the former hearing are reported in C., R. I. & P. Ry. Co. v. Keely, 87 Ill. App. 346. The second trial resulted in a judgment for \$5,000, from which the present appeal is prosecuted. The suit is by the administratrix to recover damages for the death of Henry Keely, who is alleged to have been killed by a freight train of appellant upon Thirteenth street, in Moline, Illinois, September 25, 1897. There were four counts in the declaration. The first count charges negligence in running the train at a rate of speed forbidden by an ordinance of the city of Moline. The second charges general carelessness and negligence in running the train. The court instructed the jury to find the appellant not guilty under the third and fourth counts. A trial was had upon the first two counts above specified.

The evidence warrants the conclusion that the train was running at a rate of speed prohibited by the ordinance declared upon in the first count of the declaration, and also authorized the jury in finding that the deceased was upon Thirteenth street when he was struck by the train. The

evidence tending to show that deceased was outside of the line of the street on the company's right of way when he was struck by the train is decidedly weaker than when the case was here before, and there is additional evidence warranting the conclusion that he was on the street when struck. The evidence also shows that the gates were up when deceased attempted to cross the tracks. The appellant asked the court to submit five special findings as follows:

1. Q. Does the evidence in this case prove that Henry Keely came to his death by attempting to get onto defendant's freight train when it was passing through defendant's railroad yard between Twelfth and Thirteenth streets in Moline?

2. Q. Does the evidence in this case prove that Henry Keely came to his death by being struck by defendant's train while standing near the freight train when it was passing across Thirteenth street?

3. Q. Does the evidence in this case prove that Henry Keely came to his death by attempting to get on defendant's freight train when the train was passing across Thirteenth street?

4. Q. Has it been proved by a preponderance of the evidence that the deceased, Henry Keely, was killed by defendant's freight train when he, Keely, was crossing Thirteenth street over defendant's east-bound track?

5. Q. Has it been proved by a preponderance of the evidence that at the time Keely was killed he was exercising due care for his own safety—that is, such care as an ordinarily prudent man would exercise under like circumstances?

The court refused the first, second and third of these findings and gave the fourth and fifth, which were both answered in the affirmative. The refusal to give the first three is assigned for error. We hold they were properly refused. All the information called for by the first was contained in the answer to the fourth. The answer that he was crossing on Thirteenth street when killed was

equivalent to saying that he was not in the yards of the appellant, between Twelfth and Thirteenth streets, attempting to get on the train at that place when he came to his death. The second refused does not call for an ultimate fact. It is but evidentiary. The two ultimate facts are negligence on the part of the appellant and due care on the part of the deceased. The answer called for by this interrogatory would not have determined either of these issues. The third refused is also answered by the fourth. The answer that he was crossing on Thirteenth street when he was killed is equivalent to saying that he was not then attempting to get on the train. Moreover, the finding that he was exercising due care for his own safety is an answer to this inquiry.

It is also urged that the judgment of the Circuit Court must be reversed because appellee's fourth instruction omitted the words "from the evidence." The words omitted should have been contained in the instruction.

The court instructed the jury, at the instance of the appellant, that they had no right to conclude any fact as proved against the defendant unless the jury could say the preponderance of the evidence sustained the conclusion. The jury were repeatedly instructed that all their conclusions of fact must be arrived at from a preponderance of the evidence. We are of the opinion that the words omitted could not have misled the jury nor prejudiced the rights of appellant. Their omission was not reversible error. *C. & E. I. R. R. Co. v. Mochell*, 193 Ill. 208.

It is also urged that the deceased was not in the exercise of due care for his own safety at the time of the accident. It is contended that as no one saw him at the instant he was struck by the train there is no evidence to sustain the allegation that he was then and there in the exercise of due care for his own safety. It is true there was no eye witness to the accident. None was necessary. There was evidence in the record tending to show the age and condition in life of the decedent; his general constitution, habits and surroundings; that he was lawfully at the place of the

accident; that he was not intoxicated at the time and in full possession of his faculties and that appellant was guilty of actionable negligence. In such a case the plaintiff is not bound to show, by direct evidence, that the deceased was free from negligence; and where there is no eye witness to the killing, the fact that the deceased exercised ordinary care for his own safety at the time of the injury may be shown by circumstantial evidence, or proof of facts and circumstances from which that fact may be reasonably inferred, including the natural instinct of self-preservation. I. C. R. R. Co. v. Nowicki, 148 Ill. 29; I. C. R. R. Co. v. Cozby, 174 Ill. 109; Dellemand v. Saalfeldt, 175 Ill. 310.

The jury found by their general verdict and in answer to the fifth special finding that the deceased was exercising due care for his own safety at the time of the accident. We think both findings were warranted by the evidence.

It is also urged that the court erred in not instructing the jury that the limit of recovery was \$5,000. We see no merit in this contention. If appellant desired such an instruction it should have asked the court to give it. The damages are not excessive.

Finding the record free from error the judgment of the Circuit Court will be affirmed.

HIGBEE, J., dissenting:

When this cause was before us the first time we expressed the opinion the proofs did not show that, at the time he was injured, deceased was in the exercise of ordinary care for his own safety. In my opinion the evidence upon the second trial was substantially the same as at the first. I therefore find no reason from departing from the views expressed concerning the facts in the former opinion, and think the judgment should be reversed.

Joseph Petzel v. Chicago & North-Western Ry. Co.

1. **EVIDENCE—Viewing Premises.**—A view of the premises is authorized in cases where property is alleged to have been taken or damaged, and while the information derived therefrom is not evidence, yet it better enables the jury to understand and apply the evidence.

2. **VERDICT—Upon Irreconcilable Evidence.**—Courts of review have uniformly held in cases in which there is an irreconcilable conflict in the evidence, that unless the verdict is manifestly against the weight of the evidence the judgment should not be set aside.

Trespass on the Case, for damages caused by constructing and operating a railroad in the street. Appeal from the Circuit Court of Whiteside County; the Hon. FRANK D. RAMSAY, Judge presiding. Heard in this court at the April term, 1902. Affirmed. Opinion filed July 18, 1902.

G. A. STULTZ and C. H. WOODBURN, attorneys for appellant.

WILLIAM BARGE, attorney for appellee.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

Appellant brought this suit against appellee to recover damages alleged to result from the location, construction, operation and maintenance of its railway on the street in front of his residence in the city of Sterling. A jury trial resulted in a verdict and judgment in favor of appellant for \$300. He brings the case to this court by appeal and seeks to reverse the judgment of the court below, mainly on the ground that the damages allowed by the jury were inadequate. There was about an equal number of witnesses testifying for the respective parties on the question of damages to appellant's property, resulting from the location, construction, operation and maintenance of appellant's road.

The jury viewed the property. A view in this class of cases is authorized upon the authority of *Springer v. City of Chicago*, 135 Ill. 552, and while the information derived therefrom is not evidence (*Vane v. City of Evanston*, 150 Ill. 616, and *Rich v. City of Chicago*, 187 Ill. 396), yet it

better enables the jury to understand and apply the evidence. The verdict is within the range of the proof. The amount of damages is a question of fact and exclusively within the province of the jury to determine. The jury saw the witnesses and had superior opportunities to judge of their credibility and the weight to be given to their testimony. The trial judge who possessed like superior opportunities approved the verdict. Courts of review have uniformly held, in cases in which there was an irreconcilable conflict in the evidence, that unless the verdict was manifestly against the weight of the evidence the judgment should not be set aside. The rule applies with added force in this case, in which the jury had the additional advantage of a view of the premises. We are not authorized in disturbing the finding of the jury upon the assessment of damages.

Some objection is made to the action of the court in passing upon the instructions. It is contended that appellant's fifth instruction was improperly refused. It correctly stated the measure of damages, but the same rule was declared in other given instructions and it was not, therefore, error to refuse it. Appellee's sixth instruction did not specifically mention the operation of the road as one of the elements to be considered in the assessment of damages. It was not an incorrect statement of law, but a mere omission of an element which was included in other given instructions and therefore not reversible error. *B. & O. S. W. Ry. Co. v. Derr*, 69 Ill. App. 180.

The measure of damages in this case was the difference, if any, between the fair cash market value of the property immediately before and after the infliction of the alleged injury and as a result thereof. This rule was clearly stated in the instructions.

We find no reversible error in the record. The judgment of the Circuit Court will be affirmed.

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J. Shirley Hamilton v. W. Spencer Ryan.

1. **SPECIFIC PERFORMANCE**—*Relief Rests Within Discretion of Court.*
—Relief upon an application for a specific performance of a contract rests within the sound legal discretion of a court of equity and will be decreed only in case the contract is certain in all its parts, fair in its provisions, based upon an adequate consideration, and is capable of being performed by mutual enforcement.

Bill for an Injunction.—Appeal from the Circuit Court of Mercer County; the Hon. FRANK D. RAMSAY, Judge presiding. Heard in this court at the April term, 1902. Reversed and remanded with directions. Opinion filed July 18, 1902.

McARTHUR & COOKE and BASSETT & BASSETT, attorneys for appellant.

BROCK & SCOTT, attorneys for appellee.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

This is a bill to enjoin J. Shirley Hamilton from practicing medicine in Viola or within eight miles thereof. The bill was answered and on a hearing the court entered a decree according to the prayer of the bill.

The bill was based on a written contract as follows:

“12-1-1899.

“The undersigned, J. S. Hamilton, M. D., on this date, Dec. 1, 1899, agrees never again in the future, either separately or as one of a firm, to practice general medicine in or within eight miles of Viola, Mercer county, Illinois, without the consent of Dr. W. S. Ryan, while said Ryan is located in Viola or within eight miles of Viola, Mercer county, as a practicing physician in general medicine, unless forced to by some unforeseen circumstances, in which case I agree to pay Dr. Ryan a reasonable sum for his business interests.
J. S. HAMILTON.”

“Attest: S. C. FUGATE.”

This is an equitable proceeding for the specific performance of a contract in restraint of the practice of one of the learned professions. Its determination is governed by the same general principles and rules of law applicable to a bill

for the specific performance of a contract in restraint of trade.

The consideration must be actual and valuable, and generally, in equity, it must be adequate. A mere technical consideration is not sufficient, and if grossly inadequate will be disregarded, and equitable relief in such a case will be denied. The law presumes such contracts void until the requisite consideration and the reasonableness of the limitations are shown. The rule of strict construction applies. The right must be clear and the relief decreed just and equitable.

Relief upon an application for a specific performance of a contract rests within the sound legal discretion of a court of equity and will be decreed only in case the contract is certain in all its parts, fair in its provisions, based upon an adequate consideration, and is capable of being performed by mutual enforcement. *Bowman v. Cunningham*, 78 Ill. 48; *Hamilton v. Harvey*, 121 Ill. 469.

The contract between the parties to this litigation is not under seal and recites no consideration whatever. The master in chancery to whom the case was referred to take proofs and report his conclusions was unable to find from the evidence that the consideration was sufficiently adequate to entitle the complainant to equitable relief. His report is able and exhaustive and from the whole record we find no reason for disturbing the conclusions he reached upon this issue.

But, assuming an adequate consideration, the contract is uncertain and incapable of mutual enforcement unless it affords the complainant an adequate remedy at law for the ascertainment of "a reasonable sum for his business interests," in which latter case a court of equity would be deprived of jurisdiction. It provides that the defendant may return to Viola and practice medicine if forced to by unforeseen circumstances. It does not specify what is meant by such a circumstance, nor by being forced to return. Nor does it provide who is to determine what are unforeseen circumstances, or what shall constitute the force which would

justify the defendant in resuming the practice of medicine at Viola.

If, however, it be contended that the provisions of the contract referred to are not uncertain, but are capable of enforcement, reference should be had to the circumstances under which the contract was executed.

It appears from the evidence that the defendant and one Dr. Stewart had been copartners in the general practice of medicine in Viola and vicinity for a number of years. Dr. Stewart owned all the tangible property of the firm and on September 21, 1899, sold out to the complainant, who is also a practicing physician, executing a contract similar to the one signed by the defendant, the consideration being \$780. Dr. Stewart and the defendant went to Chicago to perfect themselves as specialists in the treatment of diseases of the eye, ear and throat. After completing their special studies they located at Peoria, where their venture as specialists proved a failure. It was necessary for them to resume their general practice somewhere in order to make a living. A number of the defendant's former patients solicited him to return to Viola and resume the general practice of medicine and he did so. Not a dollar was paid the defendant by the complainant as a consideration for the contract which is the basis of this suit. The whole consideration with which the complainant parted for the two contracts from the defendant and Dr. Stewart, \$780, was paid to the latter.

The expression in the contract between the complainant and defendant, "unless forced by some unforeseen circumstances" could not have referred to physical force, nor could it have meant circumstances unforeseen by the complainant. If the expression had any meaning capable of legal ascertainment, it must have been that the defendant reserved the right to return to Viola and resume the general practice of medicine if circumstances which he had not foreseen impelled him to do so.

If the portion of the contract now under consideration is to be treated as certain and definite, then the parties

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thereby fixed a measure of damages in case the defendant returned. The contract specifies that in such event the defendant shall pay the complainant a reasonable sum for his business interest. If the parties can not agree what that amount should be it can be fixed by a jury in an action at law by the complainant against the defendant if the complainant considers his business impaired by the return of the defendant and he desires to sell it to the latter.

We regard one of two conclusions inevitable. The contract is so uncertain and lacking in mutuality as to deprive the complainant of equitable relief, or he should be remitted to a remedy at law. In either event the decree of the Circuit Court is erroneous and must be reversed.

The appellee made a motion to tax the costs of a nine-page additional abstract. The motion was taken with the case. We regard the additional abstract as unnecessary, and the motion is therefore denied.

The decree of the Circuit Court is reversed and the cause remanded to that court with directions to enter a decree dismissing the complainant's bill for want of equity.

Thomas E. Lane, Ex'r, etc., v. John A. Thorn, Adm., etc.

1. **ADMINISTRATION OF ESTATES—*Appeal from Order Allowing Widow's Award.***—Where the widow's award and her election to take in money are approved by the County Court, it constitutes a judgment for a claim of the second class. Its allowance binds the personal estate and binds the executor as to the personal estate, the title to which the law casts upon him in trust for the payment of claims and legacies and costs of administration. But the executor can appeal from the allowance; it is not final, but only *prima facie* valid, as against the real estate and its owner.

2. **SAME—*Parties to Action to Sell Real Estate.***—If the devisee of the real estate chooses to permit the sale of it for the payment of the award, the executor has no right to prevent it; he can not defend for her.

3. **SAME—*Right of Appeal from Order of County Court.***—Section 124 of the administration act, which gives the right of appeal to any person who may consider himself aggrieved by an order of the County Court entered in the administration of any estate, does not authorize an

appeal from every order entered during the entire administration. To be appealable the order must be one by which the party might have reason to be aggrieved.

4. *APPEALS—From Probate—What Constitutes a Grievance Under Sec. 124 of the Administration Act.*—The appellant must show the interest in the matter litigated which gives him the right to appeal; a grievance in the legal sense exists only when the judgment, order or decree complained of directly operates upon the property or bears upon his interest.

5. *SAME—Mere Interlocutory Orders.*—Mere interlocutory orders entered in the administration of estates, which decide definitely no matter of right, are not the subject of appeals, unless they affect the merits of the cause and constitute a grievance to the party appealing.

Petition for Sale of Real Estate.—Appeal from the Circuit Court of Boone County; the Hon. CHARLES E. FULLER, Judge presiding. Heard in this court at the April term, 1902. Affirmed. Opinion filed July 18, 1902.

WILLIAM L. PIERCE, attorney for appellant.

W. W. WOOD, attorney for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

The estate of Eli Sergeant, deceased, is being administered in the County Court of Boone County. The widow filed a petition in said court stating that a widow's award of \$700 had been made to her, and approved by the court, and that she had filed an election to take the same in money; that it had not been paid and there was no personal estate from which to pay it; and she asked that the executor be directed to file a petition to sell certain real estate owned by deceased, for the payment of claims and costs, including the sum due her on said award. She set up in her petition a certain agreement between herself and her deceased husband which, she alleged, gave her a life estate in said premises. The executor answered admitting the facts, and admitting that the widow's election to take the \$700 in money had been approved by the court, but he claimed that by virtue of said contract between Eli Sergeant and the petitioner, she was barred from a widow's award, and if not, still she was barred from asserting that award against the real estate. Upon a hearing the County

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Court directed the executor to file a petition for an order to sell the real estate, subject to the widow's life estate, for the payment of the debts and costs and expenses of administration, including the amount due the widow upon her award. The executor prayed and was allowed an appeal to the Circuit Court, where another hearing was had and a like order was entered, from which the executor prosecutes this further appeal. Before this last appeal was perfected, the widow died, and her administrator was substituted as petitioner in the court below.

In our judgment the executor of Eli Sergeant's will is seeking to litigate a matter in which he has no concern, when the party who is interested and who has the right to interpose the defense he has set up is not before the court, and will not be bound by the decision. The will of Eli Sergeant appointed Thomas Lane executor, but gave him no interest in the realty, and imposed upon him no duty relating thereto. The testator devised the real estate (which consists of a single lot of land, his former home,) to his daughter, Celinda Lane, or to her children named, if she died before the testator. The evidence seems to show that Mrs. Lane survived her father. She is not a party to this proceeding. She will be a necessary party to the petition to sell real estate which the executor has been ordered to file. The executor admits the widow's award and her election to take in money were approved by the County Court. This constituted a judgment for a claim of the second class. Its allowance bound the personal estate, and bound the executor as to the personal estate, the title to which the law cast upon him in trust for the payment of claims and legacies and costs of administration. The executor could have appealed from that allowance, which bound the property held by him in trust. The allowance is not final, but only *prima facie* valid, as against the real estate and its owner. *Marshall v. Rose*, 86 Ill. 374; *Wood v. Johnson*, 13 Ill. App. 548. When Mrs. Lane is brought into court she will have the right to present a defense or not, as she chooses. If she chooses to permit the sale of

the real estate for the payment of the award, the executor has no right to prevent it. He can not defend for her. If the devisee contests the allowance she will not be bound by any construction we may now place upon the contract between the testator and his wife. She may present other and better reasons for holding that contract bars a widow's award, or protects the real estate from being sold for its payment, than those now presented. She may have other defenses to interpose.

Our statute, section 124 of the administration act, which gives the right of appeal to any party who may consider himself aggrieved by an order of the County Court entered in the administration of any estate, does not authorize an appeal from every order entered during the entire administration. To be appealable the order must be one by which the party might have reason to be aggrieved. *Mayrand v. Mayrand*, 96 Ill. App. 478.

"The appellant must show the interest in the matter litigated which gives him the right to appeal; a grievance in the legal sense exists only when the judgment, order, or decree complained of directly operates upon the property or bears upon his interest." 2 *Woerner's American Law of Administration*, sections 544, 545; *Smith v. Bradstreet*, 16 Pick. 264; *Deering v. Adams*, 34 Me. 41; *Bryant v. Ela*, 6 N. H. 396; *Dickerson's Appeal*, 55 Conn. 223; *Cecil v. Cecil*, 19 Md. 72.

The order directing the executor to file a petition to sell real estate, was not a final order. It determined nothing. Mere interlocutory orders entered in the administration of estates, which decide definitely no matter of right, are not the subject of appeals, unless they affect the merits of the cause and constitute a grievance to the party appealing. (2 *Woerner, etc.*, section 545.) The executor had no right to cast upon the estate the expense of litigating this mere preliminary matter, when the party who could be aggrieved by the order was not before the court. The appeal should not have been asked or allowed.

Propositions of law were presented, and it is urged the rulings of the court upon them were erroneous. This was

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not a case in which the parties had a right to present propositions of law. *Martin v. Martin*, 170 Ill. 18; *Coffey v. Coffey*, 179 Ill. 283, 290. Therefore they present no question for our consideration.

The order is affirmed.

William L. Ellwood Ex'r, etc., v. Charles J. Walter, Adm'r, etc., et al.

1. **MORTGAGE—Defendant May Show that it Was Executed to Defraud Creditors.**—Upon a bill to foreclose a mortgage the defendants may show that it was executed without consideration for the purpose of defrauding creditors.

2. **MASTER—Action Must be Reviewable by Court.**—It is improper to refer a cause to a master with directions to determine a matter and take final action thereon without further review by the court.

3. **SAME—Course to be Pursued.**—It is ordinarily advisable that the master should receive the evidence subject to objections, till the conclusion of the testimony, so that the testimony objected to may be in the record where it can be examined by the court on the hearing of the exceptions, if the court shall be of the opinion that it is competent.

4. **SAME—Authority upon a Reference to Take and Report Proofs with Conclusions of Law and Fact.**—Upon a reference to take and report proofs with conclusions of law and fact, the master has authority to rule upon objections to the testimony offered, though unless it is entirely clear that the evidence is incompetent, the master should permit the testimony to be taken down subject to objection, so that it may be afterward considered without a re-reference if the master's rulings should be held incorrect.

5. **EVIDENCE—Of Reputation for Honesty and Integrity.**—Where the pleadings did not put one's reputation or character in issue and no witness had attacked his general reputation in those respects, it is proper to reject evidence of his general reputation.

Bill to Foreclose Mortgage.—Appeal from the Circuit Court of Peoria County; the Hon. LESLIE D. PUTERBAUGH, Judge presiding. Heard in this court at the April term, 1902. Reversed and remanded. Opinion filed July 18, 1902.

COVEY, MANN & COVEY, attorneys for appellant.

GRAFF & MILES, attorneys for appellees.

MR. JUSTICE DIBELL delivered the opinion of the court.

This was a bill filed by William L. Ellwood, executor *de bonis non* with the will annexed, of the estate of John Goodhardt, deceased, against Charles J. Walter, administrator of the estate of Robert F. Walter, deceased, and against the widow and heirs of said deceased, Charles J. Walter being one of said heirs. The object of the bill was to foreclose a mortgage upon certain real estate in Peoria executed by Robert F. Walter and his wife to John Goodhardt to secure a note for \$2,600 and interest, signed by Robert F. Walter and payable to John Goodhardt, dated October 30, 1896, and payable on or before five years after date. Though the wife of Robert F. Walter executed the mortgage, she did not acknowledge it. The property was homestead, and the homestead right was therefore not waived. While the note and mortgage were dated October 30, 1896, the mortgage was not filed for record till November 1, 1898. The answer of the defendants denied indebtedness from Robert F. Walter to Goodhardt; denied the execution and delivery of the note and mortgage; denied that any sum was due complainant on account of the note and mortgage; set up the homestead right; alleged that said note and mortgage were wholly without consideration, fictitious, fraudulent and void, and were executed and delivered to Goodhardt to temporarily delay the creditors of Robert F. Walter in the collection of debts against him, he being at that time financially embarrassed; that Goodhardt paid no consideration and was fully informed at the time of the execution and delivery of the mortgage that it was fictitious, fraudulent and void, and knowingly assented to said fraudulent purpose; that the mortgage was recorded for the sole purpose of carrying out said fraudulent purpose; that the creditors were thereby temporarily delayed and hindered in the collection of their claims; that said creditors were afterward paid; that Goodhardt died before the release of the mortgage could be made, as was intended and agreed; and that the note mentioned in said bill is not the note described in the mortgage, but a different one, executed at another and different time.

The cause was referred to the master to take and report the proofs, with his conclusions of law and fact. He took proofs and reported the same with his findings that the mortgage was executed and acknowledged October 30, 1896, by Robert F. Walter, and remained in his possession about two years, and was then altered by him to appear as the mortgage of Walter and his wife, the words "Anna Walter, his wife," being inserted at the time in the body of the mortgage, and her signature added thereto, and that about that time a note was drawn to correspond with the phraseology of the mortgage, and signed by Robert F. Walter, and that if any note was drawn at the time of the original execution and acknowledgment of the mortgage, such note is not the note in question; that the mortgage and note were delivered to Goodhardt and recorded, for the purpose of hindering and delaying the creditors of the firm of Walter & Son, of which Robert F. Walter was a member, and were fictitious and fraudulent; that complainant was not entitled to foreclose, and the bill of complaint was without equity. Objections were interposed before the master and overruled, and exceptions filed thereto in the Circuit Court, which were overruled, and a decree was entered dismissing the bill. From that decree complainant prosecutes this appeal.

It is argued that though a mortgage be fraudulent and void as to a creditor, yet it is binding between the parties, and neither party can set up its fraudulent character to defeat its enforcement. Whatever may be the rule in other states, the law is settled in this state that upon a bill to foreclose a mortgage the defendants may show that it was executed without consideration for the purpose of defrauding creditors. *Miller v. Marckle*, 21 Ill. 152; *Dunaway v. Robertson*, 95 Ill. 419; *Ryan v. Ryan*, 97 Ill. 38; *Tyler v. Tyler*, 126 Ill. 525; *Kirkpatrick v. Clark*, 132 Ill. 342; *Scott v. Magloughlin*, 133 Ill. 33.

The master in chancery ruled upon the testimony, sustaining some objections interposed by the appellant and some interposed by the appellee, and refused to permit appellant

to offer a certain line of testimony. It is argued that a master in chancery is a ministerial and not a judicial officer; that ruling upon the competency of evidence is the exercise of judicial authority; and that a master can only take and report the evidence submitted, and can not rule upon its competency. It has indeed been held that the master is not a judicial but a ministerial officer, but that expression was evidently used in the sense that he can make no final determination of a judicial matter. He is also called the arm of the court, and he is generally held to have such powers as a court of equity may confer upon him, provided they are left subject to review by the court. But where a cause has been referred to a master with directions to determine a matter and take final action thereon without further review by the court, this has been held improper. *Boston v. Nichols*, 47 Ill. 353; *DeLeuw v. Neely*, 71 Ill. 473; *Ennesser v. Hudek*, 169 Ill. 494. It may be that when a cause is referred to a master to take proofs only, he has no authority to rule upon testimony, but acts as any other officer taking a deposition. The conclusion seems inevitable, however, that when, as here, a cause is referred to a master to take and report the proofs with his conclusions of law and fact, he must directly or indirectly pass upon the competency of the testimony. For example, in the present case, Charles J. Walter was examined as a witness for the defendants. His testimony, if competent, strongly tended to overthrow the note and mortgage. Objection to his competency was made before the master. The master permitted the witness to give his testimony so that it might be in the record, and then sustained the objection and held the evidence incompetent. Suppose this had been the only testimony by the defendants in support of the answer, and it was not rebutted, then whether or not the master made a direct ruling sustaining or overruling the objection to the competency of the witness, he could not report his conclusions of law without determining in his own mind that that testimony was competent or incompetent. If he decided it was competent, then he would report that the case made by the note and

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mortgage was overcome, and the bill should be dismissed. If he held the witness incompetent, he would report that there was no competent testimony to defeat the note and mortgage, and complainant was entitled to a foreclosure. This is merely by way of illustrating that which must often occur before the master upon such a reference. No doubt it is ordinarily advisable for the master to pursue the course approved in *Gordon v. Reynolds*, 114 Ill. 118, 125, of receiving the evidence subject to objections, till the conclusion of the testimony, so that the testimony objected to may be in the record where it can be examined by the court on the hearing of the exceptions, if the court shall be of the opinion it is competent. *Goelz v. Goelz*, 157 Ill. 33, 39. But this only relates to the manner of procedure, and not to the authority. It seems to us that on principle the master must necessarily determine the competency of the evidence in a cause referred to him to report his conclusions.

Our attention is not called to any case where the Supreme Court of this State has directly passed upon the power of the master to rule upon objections to testimony, but the question has frequently been inferentially determined. In *McClay v. Norris*, 4 Gil. 370, 386, the court quotes with approval from *Barbour's Chancery Practice*, as follows:

"There is no question of law or equity or disputed fact or facts which a master may not have occasion to decide upon, or concerning which he may not be called upon to report his opinion to the court."

In *Brockman v. Aulger*, 12 Ill. 277, 280, the court points out the procedure by the master if a witness "refuses to answer a particular question allowed by him," implying the master is to determine whether the question is proper, and in so doing is to allow or reject the question. In *Hurd v. Goodrich*, 59 Ill. 451, 455, the court points out the procedure for parties "who may desire to have the court revise the rulings of the master as to the admission or rejection of evidence." In *Cox v. Pierce*, 120 Ill. 556, it is held that testimony taken on such a reference is "taken on the trial." In *Whiteside v. Pulliam*, 25 Ill. 285, and in *U. M.*

L. Ins. Co. v. Slee, 123 Ill. 57, 94, it is held that upon the hearing before the master "the parties have the same right to be heard by themselves or by counsel, to introduce evidence, cross-examine witnesses, and to take the various steps authorized by law, as if the hearing was before the chancellor instead of the master." In Cheltenham Improvement Co. v. Whitehead, 128 Ill. 279, the court said:

"If, in the opinion of the plaintiff in error, the evidence offered before the master was incompetent, or insufficient to establish the claim, he was required to file exceptions before the master, and if overruled there, renew the exceptions in the Circuit Court."

This implies, objections to the evidence for incompetency are to be ruled upon by the master." To the same effect is Gehrke v. Gehrke, 190 Ill. 166. In Minchrod v. Ullmann, 163 Ill. 25, speaking of the action of the master under such a reference, the court said:

"Like the chancellor, he is presumed to have considered all the competent evidence tending to prove or disprove the fact in question."

In Bauerle v. Long, 165 Ill. 340, a defaulted defendant appeared before the master on a reference, and after cross-examining witnesses, offered evidence in certain matters, and made an offer to prove certain facts in his behalf. The master rejected the offered testimony. The refusal of the master to allow him to introduce this testimony was assigned for error. The court sustained the ruling of the master. In Ronan v. Bluhm, 173 Ill. 277, the master reported objections to certain oral testimony, and to certain documents offered before him, and reported his conclusions of law that the oral proof was competent and the documents incompetent, and reported that he refused to receive the documents in evidence for any purpose. The Supreme Court passed upon these rulings and held that the master erred in his conclusions as to the competency of the proof, but gave no intimation that the master was without power to rule, and proceeded upon the apparent assumption that the master had such authority. In

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Harding v. Harding, 180 Ill. 480, 504, it was held that the master had admitted incompetent evidence under such a reference, but as there was sufficient competent proof to sustain that portion of the decree to which such evidence applied, the court refused to reverse because of the incompetent evidence. In Brueggestradt v. Ludwig, 184 Ill. 24, proof had been taken on a like reference. The Supreme Court set out a rule of the trial court giving the master under such a reference full power to determine the competency of the witness and the propriety and relevancy of the questions, and directing the manner of preserving and reviewing his rulings upon testimony. The master had sustained an objection to the testimony of a certain witness for appellees, and to certain copies of entries, and of a record, the correctness of which copies appellees sought to prove by him. The Supreme Court held the master's ruling was in part incorrect, and that the proper practice would have been for the Superior Court to have re-referred the cause to the master with instructions to admit the testimony of the rejected witness, when appellants could have cross-examined him, and could have produced evidence to disprove his testimony or explain the entries or record; but as this was an error against appellees, and there was other proof sufficient to sustain the decree, it was in those respects affirmed. Surely if a master has no power to rule at all upon the competency of the testimony the court would not have set out at length the rule of the court below which regulated the procedure in so doing. In Schnadt v. Davis, 185 Ill. 476 and 487, the court said the master "is in a sense clothed with the power to declare judgment upon the rights and interests of the parties."

The same view has been expressed by other courts. In Pratt v. Adams, 7 Paige Ch. 615, where by the reference the master was specially directed to rule upon the interrogatories propounded, the court said (p. 645):

"If any party is dissatisfied with the decision of the master in allowing or disallowing an interrogatory to the claimant, he must put it in shape to enable the court to

review the master's decision; and if the master decides that the interrogatory is improper, he should not allow it to be put or answered."

In *McCrackan v. Valentine's Executors*, 9 N. Y. 42, under a reference to take certain proofs and make a computation, the referee refused to permit certain testimony to be introduced. It was held the ruling was correct. In *Nichols v. Ela*, 124 Mass. 333, on a reference to state and report the accounts between the parties, it was held it was within the discretion of the master to limit the cross-examination of a witness. In *Gibson v. Trowbridge Furniture Co.*, 96 Ala. 357, there was a reference to a register to ascertain the amounts due certain parties and the value of certain assets. The register made numerous rulings on the admission of evidence, to which exceptions were preserved. The court reviewed these rulings, and held some of them correct and others incorrect, without any intimation the register had no power to rule upon the objections. In *Floyd v. Floyd*, 46 S. Car. 184, there was a reference to a master to hear and determine all the issues. The master held certain offered proof incompetent, but took it down and reported it on a separate sheet, and reported for the plaintiff, and reported that if the incompetent testimony was considered, still plaintiff was entitled to recover. The trial court held the master was right in excluding the testimony, and right in his conclusions. The Supreme Court held the proper practice had been pursued, and the conclusion of the trial court was correct. In *Schwarz v. Sears, Walker* (Mich.), 19, and in *Ward v. Jewett, Walker*, 45, it is clearly implied that the master has authority to rule upon the admission of the testimony, subject to review by the court, the only difference between those authorities and our courts being that the two cases just cited require a review by the court immediately, upon motion, before the master has made his report. To the same effect is *Troy Iron and Nail Factory v. Corning*, 6 Blatchf. 328. In *Jackson v. Jackson's Executors*, 2 Green's Ch. (N. J.) 96, the court held the master erred in permitting a certain cross-

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examination. In *De La Riva v. Berreyesa*, 2 Cal. 195, it was held the referees admitted much hearsay and irrelevant testimony which they should have excluded. In England, where the master passed upon interrogatories before they were propounded, the vice chancellor, in *Chennell v. Martin*, 4 Simons, 340, 6 Cond. Eng. Ch. R. 154, said:

"It constantly happens * * * that when the master has made his report, an exception is taken, because either he has admitted or rejected evidence that he ought not; and it is not the course of the court, and great inconvenience would result if it were the course, to apply, before the report is made, for an order that the master shall reject or admit proposed pieces of evidence. The propriety of what he has done is discussed on exceptions to the report. * * * I must wait till the master makes a report, and then, on exceptions, determine whether he has acted rightly in refusing to examine the defendants at all, or in any given manner."

The cases there commented upon show the constant practice by masters of ruling for or against interrogatories submitted. In 17 Ency. of Pl. & Pr. 1023, the general rule there deduced from the authorities is thus stated:

"A master or referee is governed by the ordinary rules of evidence by which a court would be governed, and he should hear and exclude evidence as if the hearing were before the court. * * * In determining the order in which proof should be submitted, the latitude which should be given parties in the examination and cross-examination of witnesses, and in many other respects, the master or referee is governed by the same rules and exercises the same discretion as the court."

We therefore conclude, both upon principle and authority, that upon a reference to take and report proofs with conclusions of law and fact, the master has authority to rule upon objections to the testimony offered; though we are also of opinion that unless it is entirely clear that the evidence is incompetent, the master should permit the testimony to be taken down subject to objection, so that it may be afterward considered without a re-reference if the master's ruling should be held incorrect.

The master properly sustained the objection to the com-

petency of Charles J. Walter as to matters occurring in the lifetime of Goodhardt, as said witness was a party defendant, part owner of the land, and was called as a witness against Goodhardt's executors, and in his own interest. The master refused to permit appellant to prove the general reputation of Goodhardt in the neighborhood where he lived, for honesty and integrity. The pleadings did not put his reputation or character in issue and no witness had attacked his general reputation in those respects. We conclude the ruling was correct. *Simpson v. Westenberger*, 28 Kan. 756; 42 Am. R. 195 and note; *Stone v. Hawkeye Ins. Co.*, 68 Iowa, 737; 56 Am. R. 370. An expression apparently to the contrary is found in *Sprague v. Craig*, 51 Ill. 288, but the question there presented made the proper rule analogous to that governing criminal proceedings, and we think it not in point here. It was charged here that Goodhardt received no consideration for this note and mortgage. That was a question of fact, pure and simple. If he did not, then he can not enforce them, no matter how good a general reputation for honesty he may have had. It is charged that, having received no consideration for them, he placed the mortgage on record to delay Walter's creditors. If there was no consideration his executor can not enforce the mortgage, no matter what Goodhardt's purpose in recording the instrument may have been. We conclude the reasoning in the cases cited from Kansas and Iowa is applicable to this case. We think the master unduly restricted the cross-examination of the witness Grimes, in view of the bias for defendants he manifested, and the many improper statements he made while testifying. Jacob Fischer was called as the first witness for complainant and by him the signature of Robert F. Walter to the note was proven, and that the value of the property covered by the mortgage far exceeded the unreleased homestead interest. No objection was then made to his competency to testify. Fischer was again called by complainant in rebuttal, and on his cross-examination then, it was brought out that he and his sister, Mrs. Anna Walter, the widow of Robert F. Walter, were

the legatees and devisees of John Goodhardt, deceased, and the only persons interested in his estate. Defendants then objected to his testifying on the ground that he was interested in the event of the litigation and therefore incompetent under the statute. The master sustained this objection. Complainant then offered to prove certain material facts by Fischer, to which defendants objected and the master sustained the objection and held him not a competent witness. Fischer was directly interested that the complainant should succeed, as it would enhance the estate of which he was a part owner. He was therefore not competent to testify as to facts occurring in the lifetime of Robert F. Walter in behalf of the complainant against the defendants, who were defending as administrator and heirs of the mortgagor. Part of the heirs of Robert F. Walter are minors and defending by guardian *ad litem*, and Fischer was also incompetent to testify against their interest as to matters occurring during their minority. The defendants did not move to exclude what Fischer has testified to when first called, and the master in his report found Robert F. Walter did sign the note. It is manifest that if objection is made Fischer is not competent to prove the signature to the note.

Grimes was the only competent witness who gave testimony tending to impeach the note and mortgage. He testified the transaction was fictitious; that there was no consideration for the note and mortgage; that the papers were delivered and the mortgage recorded to protect Robert F. Walter from his creditors, and that this was the agreement between Goodhardt, Robert F. Walter and Charles J. Walter, under which the papers were made and delivered, and that he positively knew this to be so. He testified freely what the parties understood, and that Goodhardt understood the mortgage was fictitious, etc. Yet his further examination showed that he knew no fact which would impeach these securities, and that his testimony was mainly based upon suspicions, assumptions and information derived from Charles J. Walter, an incompetent witness, and one whose statements, in his own favor, must also be incompetent.

Grimes does show that a day or two before the mortgage was recorded it was brought to his office by Charles J. Walter; that it had not then been signed by Anna Walter, the wife, and her name had not then been written in the body of the instrument; that there was no note with it; that he showed Charles a blank note and directed him how to fill it up so as to meet the description in the mortgage; that he carried the blank form to the house and Charles there filled it out in the presence of Mrs. Walter; and that he saw no money or other consideration paid. He did not see the note signed or the note and mortgage delivered to Goodhardt. He does not know they were not so delivered. He does not know what occurred when they were delivered. He has no knowledge but what \$2,600 was then paid, or but what Robert F. Walter then owed Goodhardt \$2,600 which this note and mortgage were delivered to secure. He never talked with Robert F. Walter about it. He did not see Robert F. Walter at the time he was at the house when the note was written. He never was present when Robert F. Walter and Goodhardt, the mortgagor and mortgagee, were together. He does not know what their dealings were relating to this matter. He never talked with Goodhardt about it till after the death of Robert F. Walter. He did have a conversation with Goodhardt after Walter's death. In one narration of that conversation he said he characterized the mortgage as fictitious, and Goodhardt did not make any reply to that statement, but in another narration of the same conversation he omitted that statement. All that Goodhardt said to Grimes on the subject of this mortgage in that conversation can well be interpreted as a polite intimation that he, Goodhardt, was entirely able to attend to his own business and did not require any instructions from Grimes. No fact stated by Grimes of his own knowledge is inconsistent with the proposition that when the mortgage was executed and acknowledged by Walter the transaction was not completed; that the last of October, 1898, the note intended to be secured by the mortgage was drawn and signed, the note and mortgage then for the first

time delivered, and for an adequate consideration, a loan of money then, or to secure money loaned or advanced when the mortgage was originally drawn, or some other existing debt. The note recites it is given for value received, and Grimes' testimony does not overcome that recital. There is other proof of financial dealings between Goodhardt and Walter and of moneys paid by Goodhardt for Walter to a considerable amount. The incompetent testimony of Charles J. Walter seems to have unconsciously affected the conclusion of master and court. We are of opinion the actual facts proven by competent testimony were not sufficient to overcome the note and mortgage. The law presumes this was an honest and genuine business transaction, till the contrary is shown. (*Kennedy v. Kennedy*, 194 Ill. 346.) We think we ought not to affirm the decree on the ground the signature of Walter to the note was not proven by a competent witness, in view of the fact defendants did not then object to Fischer's testifying, and did not afterward move to exclude his former testimony especially as the master found as a fact that Walter did sign the note, and the decree is in harmony with that finding.

It is assigned for error that the court allowed the present and a former guardian *ad litem* \$10 each for fees as such, to be taxed as costs, without proof that the allowance was reasonable. Section 6 of the chancery act provides that the guardian *ad litem* shall be allowed a reasonable sum for his charges as such guardian, to be fixed by the court, and taxed in the bill of costs. This allowance was not for fees as solicitors, and was a nominal sum, and we think the court was authorized to make such an allowance without proofs.

For want of sufficient competent proof that the note and mortgage were without consideration and fraudulent, the decree is reversed and the cause remanded for further proceedings.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

THIRD DISTRICT—NOVEMBER TERM, 1901.

**Illinois Central Railroad Company v. Harry Finfrock,
by His Next Friend, etc.**

1. **CONTRIBUTORY NEGLIGENCE**—*Justifying Instruction to Find for the Defendant.*—Where a person possessed of all his faculties, familiar with a crossing and its surroundings, and knowing that a train was due to pass there about that time, drives toward the crossing in a good trot, with the side curtains on the buggy, and does not stop the team or slacken its speed to enable him to see and hear the train, but without taking any precautions whatever to ascertain whether a locomotive was approaching, drives onto the tracks and collides with a locomotive, it is error to refuse an instruction directing the jury to find a verdict for the defendant.

2. **SAME**—*When a Question for the Court.*—While what is or is not negligence is always a question of fact, and questions of fact are usually left to be determined by the jury, yet where all reasonable minds would be compelled to conclude that a person has encountered danger with concurrent injury under circumstances and surroundings showing that in so doing he acted rashly, recklessly or unreasonably, then it is the duty of the court to hold that he is precluded from recovering for such injury, without submitting the case to the jury.

3. **RAILROADS**—*Duty to Look and Listen.*—The omission of the duty to look and listen before crossing a railroad will be excused where it appears that the party is misled without his fault, or where the surroundings may excuse such failure.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of DeWitt County; the Hon. WILLIAM G. COCHRAN, Judge presiding. Heard in this court at the November term, 1901. Reversed. Opinion filed June 20, 1902.

I. C. R. R. Co. v. Finfrock.

WARNER & LEMON, attorneys for appellant; J. M. DICKINSON and JOHN G. DRENNAN, of counsel.

WELTY & STERLING, for appellee.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

This was an action on the case in which the appellee, Harry Finfrock, a boy sixteen years old, by his next friend, sued the Illinois Central Railroad Company to recover damages for personal injuries received by him, and which he alleged were caused by the negligence of the railroad company.

The case was tried by jury on the issues made by the second and fourth counts of the declaration and the plea of not guilty, and resulted in a verdict and judgment in favor of appellee for \$6,000 damages.

Appellant moved for a new trial, which being denied, it excepted, brings the case to this court by appeal, and to effect a reversal argues that the court erred in refusing to direct a verdict for it at the close of the evidence, and in refusing to grant a new trial.

It is averred in both the second and fourth counts of the declaration that appellee received the injuries complained of on the 16th of July, 1900, in a collision between the buggy drawn by a team of horses that he was driving from the westward toward the eastward along and over a public street-crossing in the village of Wapella, in DeWitt county, Illinois, and a passing locomotive engine of appellant that approached and passed over the crossing from the north, going toward the south; that the collision was occasioned and the injuries inflicted by reason of the negligence of appellant, and that appellee, at the time, drove along the street and onto the crossing with all due care and diligence for his own safety.

The negligence charged in the second count was the failure to give the statutory signals while the locomotive approached and passed over the crossing; and in the fourth, that appellee permitted a house and other buildings, and

some growing trees, to remain upon its right of way on the west side of the tracks, and the north side of the street, which so obstructed the view of appellee while approaching from the westward that he could not observe the locomotive and train on the railroad as it came from the north; and that the locomotive which caused the collision was, at the time, running "at a great, immoderate and dangerous speed."

The village of Wapella contains about 450 inhabitants, and appellant's railroad runs north and south through it, crossing Elm street at grade. Elm street runs east and west through the north part of the village, and the only obstructions to the view from Elm street north on the west side of the railroad consists of the section house, which is one story high, sixteen feet square and situated 100 feet north of Elm street and 140 feet west of the track. A little northwest of the section house is a shed stable thirty feet long, eight feet high in front and six feet in the rear. East of the section house is a small coal shed. There are seven maple trees in the vicinity of the section house, which are about thirty feet tall, with limbs branching out about eight feet from the ground. The section house, sheds and trees are inclosed with a fence.

The home of appellee is seven miles west of Wapella, which is four miles north of the city of Clinton. In going from appellee's home to Clinton the public road leads through Wapella, along Elm street, across appellant's railroad. On the morning of July 16, 1900, appellee and his sister left their home in a top buggy, drawn by two horses, driven by appellee, intending to go to Clinton to attend the County Teachers' Institute, which met there that day. When they had gotten to within about two miles of Wapella, seeing a rainstorm was about to overtake them, they put the side curtains on the buggy and drove on in a good trot, and by the time they approached the Elm street crossing, about eight o'clock, it was raining hard. Upon arriving at the crossing they did not stop the team or slacken its speed to enable them to see or hear the train, but kept on in a good trot, and without taking any pre-

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cautions whatever to ascertain whether a locomotive was approaching, drove onto the tracks and collided with the south-bound locomotive drawing the fast passenger train of appellant from the north, killing the sister and severely injuring appellee.

Appellee was, at the time, possessed of all his faculties, familiar with the crossing and its surroundings, and knew that the train which struck him was due to pass there about that time.

The locomotive was running about twenty-five or thirty miles an hour when the collision occurred, and there is no doubt but that the statutory signals were given, although some witnesses testify that they were where they could have heard them, but did not.

At the close of appellee's evidence, and again at the close of all the evidence, counsel for appellant presented to the court a written instruction directing the jury to find a verdict for appellant, which was refused and an exception taken.

The contention of counsel for appellant is that the evidence shows that appellee did not exercise reasonable care for his own safety in going onto the crossing without taking any precautions to ascertain that the locomotive and train of cars were approaching, and thereby avoiding colliding with the locomotive, and for that reason the court erred in not giving the peremptory instruction requested.

We are of opinion that there is much force in that view, for under such surroundings it seems to us that reasonable minds could not differ in the conclusion that a person in possession of all his faculties, in the exercise of ordinary care, would have naturally stopped, or at least slackened his speed, looked and listened, before driving onto the crossing. And while appellee was only sixteen years of age, yet the evidence is undisputed that he was fully capable of comprehending the situation, and simply suffered his desire to speedily reach his destination and get out of the rain, to cause him to neglect taking such reasonable precautions as would undoubtedly have prevented his colliding with the locomotive.

As we said in *Wabash Railroad Company v. Monegan*, 94 Ill. App. 82 (p. 86):

"It has been frequently held by courts of last resort, not as a matter of law, but in passing upon the ultimate facts, that to cross a railroad under similar circumstances as disclosed in this case, constituted such contributory negligence as to preclude a recovery."

And in the *Monegan* case, *supra*, we quoted from several Illinois cases to show that it is the established rule in this state that "it is deemed culpable negligence to cross the track of a railroad without looking in every direction that the rails run, to make sure that the road is clear." And that "if a party rushes into danger which by ordinary care he could have seen and avoided, no rule of law or justice can be invoked to compensate him for any injury he may receive."

"We know that what is or is not negligence is always a question of fact, and that questions of fact are usually left to be determined by the jury, yet where all reasonable minds would be compelled to conclude that a person has encountered danger with concurrent injury under circumstances and surroundings showing that in so doing he acted rashly, recklessly or unreasonably, that it is the duty of the court to hold that he is precluded from recovering for such injury, without submitting the case to the jury.

It is a rule of law, also, that the omission of the duty to look and listen before crossing a railroad will be excused where it appears that the party is misled without his fault, or where the surroundings may excuse such failure. *Chicago & Alton Railroad v. Pearson*, 184 Ill. 386, and same *v. Lewandowski*, 190 Ill. 301.

But in the case at bar, it conclusively appears that appellee knew the train which struck him was due to pass at the time; knew what the surroundings which tended to prevent him from seeing or hearing the train were; and simply went upon the crossing without using any precautions to avoid a collision.

The speed of the train at the time, was not, we think, so great as to be evidence of recklessness on the part of

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appellant, nor is it so claimed in the declaration; hence the question of such recklessness on the part of the servants in charge of the train as would excuse appellee from using ordinary care to avoid a collision, was not presented.

It follows from what we have said, that the trial court erred in not directing a verdict for appellant, and for that error we will reverse the judgment without remanding the case.

Finding of Facts to be incorporated in the judgment:

The court finds from the evidence that appellee was not in the exercise of ordinary care when he received the injuries for which he claims damages; and that appellant was not guilty of the negligence charged in the declaration.

Baker & Reddick v. Emma Summers.

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r201s 52

1. **PRACTICE—Harmless Error.**—Although the rulings of the trial court upon the admission and exclusion of evidence and on the instructions may be in some minor respects inaccurate, yet where, on the whole record, it is manifest that both sides had a fair trial and that the result reached by the verdict and judgment is in accordance with the law applicable to the issues tried and the evidence produced, the judgment will be affirmed.

Trespass on the Case, to recover damages to plaintiff's means of support by reason of the sale of intoxicating liquors to her husband. Appeal from the Circuit Court of DeWitt County; the Hon. WILLIAM G. COCHRAN, Judge presiding. Heard in this court at the November term, 1901. Affirmed. Opinion filed June 20, 1902.

HERRICK & HERRICK and WARNER & LEMON, attorneys for appellants.

MARSHALL C. GRIFFIN and CHARLES C. LEFORGEE, attorneys for appellee.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

Appellee, Emma Summers, the widow of Harry Sum-

mers, deceased, sued appellants, Samuel Baker and George Reddick, who were partners in keeping a dram-shop under the name of Baker & Reddick, in the Circuit Court of DeWitt County, in an action on the case to recover damages to her means of support by reason of their selling or giving intoxicating liquors to her husband in his lifetime which contributed to his intoxication and that of one Marcum, and that by reason of such intoxication of both, Marcum killed her husband and she was deprived of him who had been before then her supporter, and who had supported her well.

Appellants demurred to the declaration which, as amended, contained five counts; and the demurrer being overruled, they pleaded not guilty to it; and upon issue joined, the case was tried by jury and resulted in a verdict in favor of appellee for \$2,500, upon which the court rendered judgment after overruling appellants' motion for a new trial. They excepted, and to effect a reversal of the judgment, bring the case to this court by appeal and insist that the court improperly ruled in the admission and exclusion of evidence; in giving and refusing instructions; and that the verdict is contrary to the evidence and the law applicable thereto.

It appears that appellants keep the only dram-shop in the town of Weldon, DeWitt county, Illinois, a town of about 600 population. In the second story of the building where they do business, there is a gambling room run by another person, and appellants sell and furnish the intoxicating liquors which are drunk by persons frequenting the gambling room. On the 25th of December, 1899, Harry Summers procured intoxicating liquors from appellants until he was very much intoxicated, and in that condition, engaged in a game of cards with one Murdock in the gambling room, where they got into a quarrel over the game, and while so quarreling, Marcum, who was a stranger to Summers, but who was somewhat acquainted with Murdock, came into the gambling room, also in a drunken condition, resulting from intoxicating liquor which he had

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bought from appellants, and took the part of Murdock in the quarrel. This so enraged Summers that he attacked Marcum, and was shot and killed by him.

The evidence leaves no doubt but that the drunken condition of both Summers and Marcum caused the former to be killed by the latter, and the jury properly so found. The insistence of appellants that the evidence fails to show that the intoxication of Summers and Marcum was the proximate cause of the killing of the former by the latter, is without force in view of the evidence in this record.

While the rulings of the trial court upon the admission and exclusion of evidence and on the instructions were, in some minor respects, inaccurate, yet on the whole record it is manifest that both sides had a fair trial, and that the result reached by the verdict and judgment is in accordance with the law applicable to the issues tried and the evidence produced, and therefore the judgment in this case should, and will be, affirmed.

T. C. Robinson v. Benton Sharp et al.

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1. **PRACTICE—Where Reviewing Court Will Not Disturb Finding of the Chancellor.**—Where the evidence is heard by the chancellor a reviewing court will not disturb his finding, except where the record discloses that the finding is clearly and palpably against the evidence.

2. **ATTORNEY AND CLIENT—Burden of Proof as to Equity of Transaction.**—In matters of contract between attorney and client the greatest fairness is exacted, and the burden of proof as to the fairness, adequacy and equity of the transaction is upon the attorney; and upon his failure to make such proof, courts of equity will always, at the instance of the client, treat the transaction as one of constructive fraud and set aside the contract.

Bill to Set Aside a Contract.—Appeal from the Circuit Court of Fulton County; the Hon. JOHN J. GLENN, Judge presiding. Heard in this court at the November term, 1901. Affirmed. Opinion filed June 20, 1902.

CHIPERFIELD & CHIPERFIELD, attorneys for appellant.

HARRY M. WAGGONER and LUCIEN GRAY, attorneys for appellees.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

This was a bill in chancery, filed in the Circuit Court of Fulton County on April 11, 1901, by appellees, Benton Sharp and Murray Sharp, against appellant, T. C. Robinson, setting up that appellees' sister, Carrie S. Crabel, departed this life on December 25, 1900, leaving them and their sister, Lilly McPherson, as her only heirs at law; that on December 3, 1900, one J. B. Snedeker was duly appointed administrator of the estate of their deceased sister, and he is discharging the duties as such; that when their sister died she held three policies upon her life which were issued to her by the New York Life Insurance Company of New York, aggregating the sum of \$7,000, and payable to her estate; that shortly prior to her death appellant, as her attorney, and at her request, examined said insurance policies, and informed her and appellee Benton Sharp, that they were valid; that shortly after her death appellees employed appellant as their attorney, to look after their interests in the estate of their deceased sister, and after he was employed he informed them that it was doubtful whether said policies could be collected, for the reason that there existed a serious doubt about the validity of the same; that he urged appellees to make arrangements with him to collect the money due on the policies for a compensation conditional upon his succeeding, and then told them that the usual charge of attorneys for making such collections was one-half of the amount collected; that having implicit confidence in appellant as their attorney, and believing that he had truthfully advised that there was some doubt as to the validity of the policies, and truthfully informed them that attorneys usually obtained one-half for collecting in such cases, appellees were each thereby fraudulently induced to enter into a written agreement with appellant on December 28, 1900, whereby they assigned to him one-half interest in the policies in consideration that he would collect the money

due the estate upon them; that, in fact, there was no doubt whatever concerning the validity of the policies, nor was it usual for attorneys to be allowed one-half for collecting such, all of which was well known to appellant, but unknown to appellees, when the written agreement was made; that the written agreement, by reason of the excessive amount therein given to appellant for his services, is unfair and inequitable to appellees, and for that reason it is void as to them, and ought, in equity and good conscience, to be set aside and canceled by the court; that appellees are willing to pay, and here offer to pay appellant any sum of money which he is legitimately entitled to receive for the services rendered them as their attorney; that on March 4, 1901, appellant brought suit against appellees in the Circuit Court of Fulton County, Illinois, on the law side thereof, and therein claims from them the sum of \$3,500, under the terms of said written agreement, for the services rendered by him in the collection of the policies; that appellees are unable, in the suit at law, to make a complete and adequate defense to appellant's claim, based upon the written agreement, by showing the false statements and misrepresentations made to them by appellant, to induce them to make it, and by which they were fraudulently induced to enter into the same; that appellees are not indebted to appellant in the sum of \$3,500, but are the victims of confidence misplaced in him.

And the bill prays that the written agreement be set aside and canceled, and for that purpose, that appellant be required to produce same to the court; that he be restrained from further prosecuting the suit at law thereon, and for general relief.

Appellant answered the bill admitting the death of Carrie S. Crabel; her leaving the heirs as stated; that J. B. Snedeker is administrator; that deceased held insurance policies as stated, which were payable to her estate; but denies that Lilly McPherson has any interest therein as heir or otherwise.

Admits that on December 28, 1900, appellees executed

and delivered to appellant the written agreement mentioned in the bill, and that they then employed him as their attorney to look after their interest in the estate of their deceased sister, but denies that at any time after or before he was so employed, appellant advised them that the validity of the policies were in doubt, or informed them that the usual charge of attorneys for making collections in such cases was one-half the amount collected.

Alleges that the agreement made with appellant and appellees which is mentioned in the bill, is valid and binding between them and ought not to be set aside nor canceled, for the reason that it was fairly entered into. Admits that appellant commenced suit upon the agreement as alleged, but denies that appellees will be unable at law to make or avail themselves of all legal or proper defenses thereto, and states that there exists no reason in law or in equity why appellee can not make, on the law side of this court, any and all defenses to the suit which he should be permitted to make in a court of chancery. Alleges that on December 28, 1900, at the earnest solicitation and request of appellees, appellant entered into an agreement in writing with them, whereby they assigned to him one-half interest in the policies of insurance aforesaid; that prior to that date appellant had never been the attorney for appellees or either of them, nor had he, before the delivery of said written agreement to him by them, ever agreed with them or either of them, to represent them, or either of them, as their attorney in any manner whatsoever; that said agreement was made when the relation of attorney and client did not exist, and when appellant had a perfect legal right to make any contract whatsoever with appellees.

The answer further alleges that Carrie S. Crabel was, at the time the policies were written, a sick and diseased person, and presumably incompetent to pass a proper medical examination to be accepted as insurable, and for that reason there was, at the time the written agreement in question was made, a serious doubt as to whether the policies of insurance could be collected; that after the agreement was

made, appellees, with full knowledge of all the facts, ratified and affirmed the same.

And the answer also states that appellant submits to the court that every and all the matters in the bill mentioned and complained of, are such as may be tried and determined in a court of law, and with respect to which appellees are not entitled to any relief from a court of chancery, and asks that appellant shall have the same benefit of this defense as if he had demurred to the bill.

A general replication was filed to the answer, and the cause was heard by the chancellor upon the pleadings and evidence taken in open court before him, and he entered a decree finding the facts stated in the bill were true; that the equities of the case were with appellees; and that while the relation of attorney and client existed between appellant and appellees, they, on December 28, 1900, entered into the written agreement as alleged in the bill, which agreement is as against appellees inequitable and unreasonable, and for that reason is decreed to be set aside and for naught held or esteemed; that appellant deliver the written agreement to the clerk of the court to be by him canceled, and that appellant be enjoined from further prosecuting the suit at law against appellees upon said agreement.

It is also stated in the decree that appellant should have a reasonable compensation from appellees for his services in collecting the money on the policies, as by their bill they have offered, and that the court therefore offers to hear evidence to ascertain what would be a proper compensation for such services, but that appellant declined and refused to make proof in that behalf; and the decree orders that the written agreement be set aside and for naught esteemed; that appellant deliver it to the clerk of the court to be by him canceled; and that he be enjoined from further prosecuting the suit at law thereon.

From that decree appellant appeals to this court and urges its reversal on the alleged grounds that the finding is against the evidence and the equities of the parties; and that the bill ought to have been dismissed for want of

jurisdiction in chancery, as appellees can make as complete and adequate a defense to the validity of the agreement on the law as well as the chancery side of the court.

The evidence, while somewhat conflicting on the question of whether the written agreement between the parties was made after or at the time the relation of attorney and client was created, in every other respect, substantially sustains the material allegations of the bill.

The contention of appellant that the evidence did not warrant the finding of the court, and does not sustain the decree rendered, is without force, for the reason that the evidence was heard by the chancellor in open court, and was conflicting only as to whether the relation of attorney and clients was created between the parties before or at the time the written contract was executed. The learned chancellor found in favor of appellees on that question and the record contains ample evidence to sustain the finding. Where the evidence is heard by the chancellor, a reviewing court will not disturb his finding except where the record discloses that the finding is clearly and palpably against the evidence. *Fabrice v. Von der Brelie*, 190 Ill. 460, and cases there cited.

In matters of contract between attorney and client the greatest fairness is exacted, and the burden of proof as to the fairness, adequacy and equity of the transaction is upon the attorney; and upon his failure to make such proof, courts of equity will always, at the instance of the client, treat the transaction as one of constructive fraud and set aside the contract. *Jennings v. McConnel*, 17 Ill. 148; *Morrison v. Smith*, 130 Ill. 304; and *Willin v. Burdette*, 172 Ill. 117.

The contention of appellant that the court of chancery was without jurisdiction in this case because appellees could have successfully defended the action at law for the fraud claimed to have been practiced upon them by appellant in inducing them to enter into the written agreement, is likewise without force, for the reason that the fraud which they claim induced them to execute the agreement consisted in the misrepresentations and false statements made

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to them by appellant, and which they were induced to believe on account of the confidence they reposed in him as their attorney, and that such misstatements and representations were concerning the inducement to make the agreement, and in such cases a court of chancery, and not of law, is the proper forum to annul the contract. *Papke v. Hammond Co.*, 192 Ill. 631.

Finding that the evidence supports the finding and that the court had jurisdiction to render the decree, the latter will be affirmed.

Ephraim Gilmore v. R. R. Bailey and H. H. Richmond, Partners as Bailey & Richmond.

1. **BROKERAGE CONTRACTS**—*When Broker is Entitled to Commissions.*—Defendant entered into the following agreement with plaintiffs :

"I, E. Gilmore, owner in fee of above property, authorize Bailey & Richmond to bargain and sell the above land at \$75 per acre, and agree that I will convey as above, said lands on sale of same. I agree the land shall be left with Bailey & Richmond for sale as above for six months from date hereof, and thereafter until five days of notice of withdrawal in writing. If Bailey & Richmond sell or are instrumental in selling the land, I will pay them a commission of \$1 per acre of selling price. I will furnish warranty deed and abstract showing good title in case of sale.

Dated May 15, 1899."

Held, that under this agreement, when plaintiffs had found a purchaser who was able and willing to take the land at the specified price, they might contract to sell it to him, allow a reasonable time for defendant to furnish the abstract, make the deed, and for the purchaser to examine them in order to ascertain whether he was getting a good title to the land before the sale should be completed, and were not obliged to require a cash payment.

Assumpsit.—Appeal from the Circuit Court of Ford County; the Hon. JOHN H. MOFFETT, Judge presiding. Heard in this court at the November term, 1901. Affirmed. Opinion filed June 20, 1902.

CLOUD, MOFFETT & THOMPSON, attorneys for appellant.

A. L. PHILLIPS, attorney for appellees.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

The appellees, R. R. Bailey and H. H. Richmond, partners under the name of Bailey & Richmond, on January 19, 1901, commenced an action of assumpsit in the Circuit Court of Ford County against appellant, Ephraim Gilmore, alleging that he was indebted to them in the sum of \$300 for services which they rendered in procuring a purchaser for 300 acres of his land which he had agreed with them they should sell for him at \$75 an acre, they to be paid \$1 an acre for so doing.

Appellant pleaded non-assumpsit. The case was tried by jury and resulted in a verdict and judgment in favor of appellees for \$300. Appellant having moved for a new trial, which was denied and an exception taken, brings the case to this court by appeal, and to obtain a reversal of the judgment, insists that the court erred in admitting improper and rejecting proper evidence; in giving improper and refusing proper instructions; that the verdict is contrary to the evidence and the law applicable thereto, and that the court erred in denying the motion for a new trial.

It appears by the evidence that appellees are real estate brokers at Gibson City, Ford county, Illinois; that appellant lives in the State of Indiana, where he owns land; and that he also owns a farm of 300 acres in Champaign county, Illinois. On May 15, 1899, appellant and appellees entered into two written agreements concerning the sale of certain of appellant's land by appellees, one of the agreements being for land in Indiana, the other for land in Champaign county, Illinois, the one for the latter being as follows:

"Description: Section 12 and 1, township 22, range 7, Champaign county, Illinois, 300 acres. Details as to improvements, etc. Incumbrance \$2,000, due in 1900.

I, E. Kilgore, owner in fee of above property, authorize Bailey & Richmond to bargain and sell the above land at \$75 per acre, and agree that I will convey as above, said lands on sale of same. I agree the land shall be left with Bailey & Richmond for sale as above for six months from date hereof, and thereafter until five days of notice of withdrawal in writing. If Bailey & Richmond sell or are

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instrumental in selling the land, I will pay them a commission of \$1 per acre of selling price. I will furnish warranty deed and abstract showing good title in case of sale.

Dated May 15, 1899."

Appellees, having failed to find a purchaser for the lands up to May 25, 1900, on that day wrote appellant a letter as follows:

"Dear Sir: We are revising our lists, and notice the contracts of yours are out, but are good till we get notice of five days. We wish no misunderstanding, however. The Champaign Co., Ill., land is listed at \$75 an acre; the Ind. land at 35. Can we consider them good and on the market at that? Have party think can show the Champaign Co. land to, next week. Is it rented for longer than next March?"

To this letter appellant made no reply, but in September, 1900, Mr. Richmond, of the appellee firm, met appellant on the train going from Chicago to Iowa, and they had a talk in which Mr. Richmond testified appellant inquired whether appellees had sold or had a prospect of selling the land in Champaign county, Illinois; that appellant stated he had received appellee's letter to him of May 25, 1900, and that they should continue to try and sell his lands named in the agreements, but said nothing as to the prices; that Mr. Richmond in that conversation requested appellant to send appellees a plat, showing the location of the tiling on the land in Champaign county, Illinois, which appellant said he would do.

Up to December 26, 1900, appellant had not sent appellees the plat referred to in their conversation on the train, and they on that day sent him a letter by mail as follows:

"Dear Sir: We have party figuring on your 300 acres here, and wish you would send us plat of tiling you spoke of when I saw you on way to Iowa."

To which appellant replied by letter on December 28, 1900, as follows:

"Dear Sir: Enclosed find plat of my farm in Champaign county, showing tiling."

And enclosed the plat referred to.

On January 11, 1901, appellees procured from one Miles S. Rankin, a written contract to purchase the 300 acres of land, which contract is as follows :

" This agreement made this 11th day of January, 1901, between E. Gilmore of —, Indiana, party of the first part, and Miles S. Rankin, of Champaign county, Illinois, of the second part, witnesseth, that first party hereby sells to second party the following described real estate : 300 acres in sections 1 and 12, in Brown township, Champaign county, Illinois, known as E. Gilmore farm, containing 300 acres, more or less, for the sum of \$22,500 or \$75 per acre. First party covenants to convey above described premises to second party by a good and sufficient warranty deed executed by first party and wife in due form of law, deed to be delivered to second party on payment being made as herein provided, on or before the 1st of March, 1901.

First party agrees on or before the 1st day of March, 1901, to furnish second party a complete abstract of title to said premises, brought to date, certified by a competent abstractor, showing good title to said premises, free of incumbrance save and except a certain mortgage for \$2,000. First party to pay interest on above mentioned \$2,000 to March 1, 1901, and allow second party a reasonable opportunity to have abstract examined. Taxes for 1900 to be paid by first party. Possession of premises to be delivered to second party on or before March 1, 1901, subject to lease with Ferguson for 1901, which lease is to be turned over to Rankin, or the rents of the place for 1901. Second party agrees to pay said sum of \$22,500, as follows : One thousand cash upon execution of this agreement, receipt whereof is acknowledged, and assume the \$2,000 mortgage as part of the purchase money, and the remainder in cash on March 1, 1901, and on receipt of the deed as herein provided.

It is mutually agreed by the parties hereto, that the covenants and agreements herein contained shall extend to and be obligatory upon the heirs, executors and assigns of the respective parties; that time is of the essence of this contract, and that either party hereto who shall fail or refuse to comply with the provisions of this contract, on his part to be performed, shall forfeit and pay to the other party the sum of — dollars, which sum is hereby fixed and agreed upon as the liquidated damages to be sustained by either party from failure or default upon the part of the other.

In witness whereof the parties have hereunto set their

hands and seals, in duplicate, the day and year first above written.

MILES S. RANKIN. [Seal.] ”

This contract, and a duplicate, appellees forwarded by mail to appellant with request for him to sign, but they were returned to them because appellant was absent from home. On January 19, 1901, appellant called upon appellees at their office in Gibson City and they requested him to execute the contract for the sale of the land to Rankin, but he refused so to do, stating at the time that he objected to selling it to him for \$75 per acre and would not sell it for less than \$80 per acre; and claimed that he had told Mr. Richmond when he talked with him on the train, not to sell the land for less than \$80 per acre.

When the contract of purchase was signed by Mr. Rankin, he placed in the bank at Gibson City, all the money required to be paid to appellant by the terms thereof upon the latter complying with the contract. And there was no question but that Mr. Rankin was able and willing to take the land on the terms specified in the contract of sale.

Appellant testified that when he talked with Mr. Richmond on the train, he told him that appellees should sell the land for \$80 per acre instead of \$75 as specified in the agreement between appellees and himself.

The court admitted the written contract of purchase signed by Mr. Rankin over the special objection and exception of appellant, that it provided for the sale of the land on a credit from January 11, 1901, until March 1, 1901, and that the written agreement between appellant and appellees, while authorizing them to sell the land at \$75 per acre, did not provide for its sale on credit, the legal effect of which was to authorize the sale for cash only, so that the sale to Rankin was not binding upon appellant for want of authority in appellees to make it.

At the close of appellees' evidence, and again at the close of all the evidence, appellant requested the court to direct the jury peremptorily to find a verdict in his favor, and presented a written instruction to that effect, but the court refused it.

The contention of counsel for appellant in this court as well as in the trial court, is that the written agreement under which appellees were alone authorized by appellant to sell the land, did not warrant them in selling it to Mr. Rankin on a credit from January 11, 1901, the date of such sale, to March 1, 1901, when the purchase money was, by the terms of the sale, provided to be paid, for which reason appellant was not bound to consummate such sale or to pay appellees anything for their services in making it.

In that view, however, we do not concur, for the reason that it gives too narrow a construction to the intention of the parties as manifested by the terms of the written agreement authorizing the selling of the land. For in it we find that they say in case of sale appellant "will furnish warranty deed and abstract showing good title," from which it is but fair to infer that it was intended when appellees found a purchaser who was able and willing to take the land at the specified price, that they might contract to sell it to him and allow a reasonable time for appellant to furnish the abstract and make the deed, and for the purchaser to examine them in order to ascertain whether he was getting a good title to the land before the sale should be completed.

Appellees found a purchaser in Mr. Rankin on January 11, 1901, and in arranging with him to take the land at the price specified in their agreement with appellant, it was no transgression of the authority given them therein to contract to sell him the land and allow until March 1, 1901, to complete same. For we find there was nothing unreasonable or unusual in the terms fixed in the contract of sale as signed and sealed by the purchaser, which warranted appellant in refusing to complete such sale, and to pay appellees \$300 for their services in making it, save and excepting that the contract to sell the land to Mr. Rankin at \$75 was in the face of appellant's direction to Mr. Richmond not to sell it at that price, but for \$80. Mr. Richmond denied under oath, however, that any such direction was given him by appellant before the contract of sale to Mr. Rankin was

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made, and the jury and the trial court saw both, and they believed Mr. Richmond's version of that matter, and that was their province, in the absence of anything appearing to indicate that they were biased from passion or prejudice, and nothing of that kind was shown.

The view we have taken of the case as above expressed, renders it unnecessary to otherwise consider or refer to the other errors assigned and urged except that we examined all the rulings of the trial court on the admission and rejection of evidence, and upon the instructions, and find that no prejudicial error was committed against appellant in any of them.

The conclusion reached by the trial court in this case, in our opinion, being the only just one under the evidence and law applicable thereto, the judgment, for that reason, must and will be affirmed.

Chicago & Alton Railway Company v. City of Carlinville.

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1. CITIES AND VILLAGES—*Unreasonable Ordinances.*—The general rule is, that where the legislature, in terms, confers upon a municipal corporation the power to pass ordinances of a specified and defined character, if the power thus delegated be not in conflict with the constitution, an ordinance passed pursuant thereto can not be impeached as invalid because it would have been regarded as unreasonable if it had been passed under the incidental power of the corporation, or under a grant of power general in its nature. What the legislature distinctly says may be done, can not be set aside by the courts because they may deem it unreasonable or against sound policy.

2. SAME—*Where Mode of Exercise of Power to Legislate Is Not Prescribed.*—Where the power to legislate on a given subject is conferred, and the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid.

3. ORDINANCES—*How Unreasonableness Is To Be Determined.*—Whether a particular ordinance is unreasonable and therefore void, is a question to be determined by all the circumstances of the city, the objects sought to be attained, and the necessity which exists for the ordinance.

4. *SAME—Burden of Proof.*—The presumption is always in favor of a statute or of an ordinance passed in pursuance of competent statutory authority, and the burden of showing that a statute or ordinance is invalid, is upon the one asserting it.

Prosecution Under City Ordinance.—Appeal from the Circuit Court of Macoupin County; the Hon. ROBERT B. SHIRLEY, Judge presiding. Heard in this court at the November term, 1901. Affirmed. Opinion filed June 20, 1902.

PATTON, HAMILTON & PATTON, attorneys for appellant;
WILLIAM BROWN, of counsel.

WILLIAM H. STEWARD, city attorney, and A. J. DUGGAN, attorneys for appellee.

Where the legislature, in terms, confers upon a municipal corporation the power to pass ordinances of a specified and defined character, if the power thus delegated be not in conflict with the constitution, an ordinance passed pursuant thereto can not be impeached as invalid because it would have been regarded as unreasonable if it had been passed under the incidental powers of the corporation, or of a grant of power general in its nature. In other words, what the legislature says may be done, can not be set aside by the courts because they may deem it unreasonable or against sound policy. *City of Lake View v. Tate*, 130 Ill. 247; *Mason et al. v. Shawneetown*, 77 Ill. 533; *Hayes v. Railroad Co.*, 111 U. S. 228; *Taylor v. Carondelet*, 22 Mo. 105; *Dillon, Mun. Corp.* (4th Ed.), Sec. 994, 995; *North Chicago City Ry. Co. v. Lake View*, 105 Ill. 207; *Tudor v. Chicago & South Side Rapid Transit Co.*, 154 Ill. 129.

The presumption is always in favor of the validity of a statute ordinance passed in pursuance of competent legal authority. The burden of showing the validity of a statute or ordinance is upon him who asserts it, and the intendments will all be taken against him. *Harmon v. Chicago*, 140 Ill. 374; *The People v. Cregier*, 138 Ill. 401.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

This was a prosecution by the City of Carlinville against

the Chicago & Alton Railway Company to enforce the payment of a fine for the alleged violation, by the company, of an ordinance of the city imposing a penalty for running within the limits of the city, any passenger train or car at a greater rate of speed than ten miles per hour, or any freight train or car at a greater rate of speed than six miles an hour.

The case was commenced before the police magistrate of the City of Carlinville, and after being tried by him, was taken by appeal to the Circuit Court, where, by consent of parties, it was tried by the court without a jury, and resulted in a finding and judgment against the company of a fine of \$5, and for costs. The company excepted to the finding and judgment, and brings the case to this court by appeal. The error assigned and urged for a reversal is that the ordinance is void on account of being unreasonable, a restriction upon interstate commerce carried on between the State of Illinois and Missouri, and an unnecessary hindrance to the speedy carrying of the United States mail.

It is conceded that a fast passenger train of the company, known as the "Alton Limited," ran through the limits of the city at a rate of speed in excess of ten miles an hour, and the evidence shows that it ran at the rate of about fifty-five or sixty miles per hour.

The City of Carlinville is about midway between the City of Springfield and the City of East St. Louis, and is located on the main line of the Chicago & Alton Railway. It is the county seat and commercial center of Macoupin county, and has a population of 3,600 people, with the usual residences, stores, shops, and such industrial plants as are common to cities of its size. It also has a coal shaft situated directly on this railway that supplies the city and country around it with coal by means of wagons. The railway tracks run from the northeast toward the southwest for a distance of one and one-eighth miles through the westerly part of the corporate limits of the city, and most of the people live and do business on the east side of the railroad.

The railroad crosses at grade four public thoroughfares

within the city limits, two of which are in constant use by a great many people. A coal shaft, a grain elevator and a pickle factory are located as near to the tracks as will permit trains to pass, and to a great extent, obstruct the view of persons crossing the railroad on these thoroughfares.

The "Alton Limited" is a fast, luxuriously equipped train, put on for the accommodation largely of through travel between Chicago and St. Louis, and carries the United States mail. It is scheduled to run between those cities in about seven and one-half hours, and stops only at the larger cities along the route, and when necessary to take coal or water, and to receive orders.

The distance from Chicago to St. Louis by the Alton Railway, is 280 miles, sixty-five of which is within the limits of incorporated cities, towns and villages.

The Illinois Central and the Wabash Railroads also run trains between Chicago and St. Louis, and are competitors of the Alton Railway for business between those cities. The distance between the two cities is about the same over each of the three roads, but the Central and the Wabash each have a less number of miles of their track within the limits of incorporated cities, towns and villages, than the Alton has.

The City of Carlinville is organized under the general incorporation law of the State, which authorizes the city council of any city organized thereunder, "to regulate the speed * * * of cars and locomotives within the limits of the corporation." The statute in relation to fencing and operating railroads provides that no such ordinance shall limit the rate of speed in case of passenger trains, to less than ten miles an hour, nor in any other case, to less than six miles per hour. And the ordinance of the city in force at the time in question is as follows:

"Sec. 261. No railroad company or conductor, engineer, or other employe of such company managing or controlling any locomotive engine, car or train upon any railroad track, shall run or permit to be run, within the limits of said city, any passenger train or car at a greater rate of speed than ten miles per hour, nor any freight train or car

at a greater rate of speed than six miles per hour, under a penalty in either case of not exceeding twenty-five dollars for each offense."

By the general incorporation law, express power is conferred upon the city council of Carlinville to regulate by ordinance, the speed of trains while passing through its city limits. And the statute regulating the fencing and operating of railroads provides that such ordinance must not limit the rate of speed in case of passenger trains, to less than ten miles an hour. The ordinance is therefore within the power conferred, and does not require trains to run at a less rate of speed than the statute prohibits.

The general rule is, that "where the legislature, in terms, confers upon a municipal corporation the power to pass ordinances of a specified and defined character, if the power thus delegated be not in conflict with the constitution, an ordinance passed pursuant thereto can not be impeached as invalid because it would have been regarded as unreasonable if it had been passed under the incidental power of the corporation, or under a grant of power general in its nature. In other words, what the legislature distinctly says may be done, can not be set aside by the courts because they may deem it unreasonable or against sound policy. But where the power to legislate on a given subject is conferred, and the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid." 1 Dillon on Corporations, Sec. 328; *City of Lake View v. Tate*, 130 Ill. 247.

In *Toledo, Peoria and Warsaw Railway Co. v. Deacon*, 63 Ill. 91, where the validity of an ordinance of the town of Cuba, regulating the speed of railroad trains within its corporate limits to five miles an hour, was involved, Justice Thornton, speaking for the court, said :

"Though the legislature has granted franchises to railway corporations, and authorized them to procure the right of way, and operate their trains by the power of steam, yet they have not unlimited discretion in the regulation of the speed of trains. They can not act recklessly and in disre-

gard of the safety and rights of others. The state has reserved to itself the power to enact all police laws necessary and proper to secure and protect the life and property of the citizen. Prominent among the rights reserved, and which must inhere in the state, is the power to regulate the approaches to and the crossing of public highways, and the passage through cities and villages, where life and property are constantly in imminent danger by the rapid and fearful speed of railway trains. The exercise of their franchise by corporations must yield to the public exigencies and the safety of the community."

And what he there said, is repeated by the court in *Chicago & Northwestern Ry. Co. v. City of Chicago*, 140 Ill. 309.

In *City of Lake View v. Tate*, 130 Ill. 247, it is held that where the subject-matter and provisions of a municipal ordinance are left to the discretion of the city council, such discretion is not absolute, but is subject to the limitation that the ordinance must be reasonable. And that whether a particular ordinance is unreasonable and therefore void, is a question to be determined by all the circumstances of the city, the objects sought to be attained, and the necessity which exists for the ordinance.

And in *Wice v. Chicago & Northwestern Ry. Co.*, 193 Ill. 351, it is held that an ordinance must be reasonable, or it will be held void, and that the question of the reasonableness is one for the decision of the courts; that in determining that question, the courts will have regard to all the existing circumstances or contemporaneous conditions, the object sought to be attained and the necessity, or want of necessity, for its adoption.

In determining this question, it must be remembered that the presumption is always in favor of a statute or of an ordinance passed in pursuance of competent statutory authority, and the burden of showing that a statute or ordinance is invalid, is upon the one asserting it; therefore, unless the evidence in this case establishes facts from which it appears that the ordinance in question imposes an unreasonable restriction upon the rate of speed of trains while passing through the limits of the city, it must be held to

Morgan v. The People.

be valid in that respect. The People ex rel. v. Cregier, 138 Ill. 401; and Harmon v. City of Chicago, 140 Ill. 374.

Considering the population of the City of Carlinville, and of the territory tributary thereto, and the constancy with which numbers of people must cross the railroad tracks at grade within the limits of the city, we can not say that the provisions of the ordinance are an unreasonable restriction upon the rights of the railroad company in the respect claimed, but a wholesome enactment contributing to the safety of those traveling on its trains as well as those using the public crossing.

Statutes and regulations requiring "trains to stop at railroad crossings and drawbridges, and to reduce the speed of trains when running through crowded thoroughfares, requiring its tracks to be fenced, and a bell and whistle to be attached to each engine, signal lights to be carried at night, and tariff and time tables to be posted at proper places, and other similar requirements contributing to the safety, comfort and convenience of their patrons," are upheld. Cleveland, Cincinnati, Chicago and St. Louis Ry. Co. v. People of the State of Illinois ex rel. Thos. M. Jett, 44 U. S. (L. Ed.) 868.

The finding and judgment of the Circuit Court in this case are in accordance with the evidence and the law applicable thereto, and the latter will be affirmed.

**George Morgan v. The People of the State of Illinois
ex rel.**

1. **STATUTES—Animals Running at Large.**—The statute prohibiting the running at large of animals does not apply to cows in the highway when they are under the care and control of an attendant who actually prevents them from trespassing upon the property of others and from interfering with public travel.

2. **SAME—Meaning of Phrase "Running at Large."**—The phrase "running at large" as used in the statutes means "strolling about without constraint or confinement; as. wandering, roving or rambling at will, unrestrained." (Anderson's Dictionary of Law.)

Prosecution Under Sections 1 and 2 of the Act Entitled "Animals."—Error to the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge presiding. Heard in this court at the November term, 1901. Reversed. Opinion filed June 20, 1902.

EVANS & McDOWELL, attorneys for plaintiff in error.

JOHN W. KEESLAR, state's attorney, and WILLIAM M. ACTON, assistant state's attorney, for defendant in error.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

This was a prosecution of the plaintiff in error, George Morgan, by the people, for an alleged violation of sections 1 and 2 of the act entitled "Animals." It was commenced on July 16, 1900, by one Canady making a sworn complaint to a justice of the peace in Vermilion county, in which it was in substance charged that plaintiff in error on July 15, 1900, willfully, unlawfully and maliciously permitted certain cows to run at large upon the public highway of Vermilion county, Illinois, contrary to the statute.

At the trial before the justice, plaintiff in error was found guilty and adjudged to pay a fine of \$2 and the costs. He took the case by appeal to the Circuit Court where it was tried by jury and resulted in a verdict again finding him guilty and fixing the fine at \$2, upon which the court rendered judgment.

Plaintiff in error moved to have the verdict set aside and a new trial granted, but it was denied and he excepted. He now prosecutes this writ of error, and to effect a reversal of the judgment, insists that the verdict is contrary to the evidence, and that the court gave an improper instruction at the instance of the people, and refused proper instructions requested by plaintiff in error.

It is not disputed but that in the forenoons of the days during the time in question, plaintiff in error pastured his three milch cows upon the public road located on two sides of the 100 acres of farm land situated in said county, upon which he lived; that he cultivated it, as tenant of the owner; and that while being so pastured, the cows were

always under the care and control of one or two of his sons, who always kept them from trespassing upon the premises of others and from interfering with persons traveling along the highway.

At the instance of the people, the court gave the jury the following instruction :

"You are instructed that no person, under our law, has the right to herd any domestic animal of the species of a horse, mule, cattle, swine, sheep, ass or goose upon the public highway; and if you believe from the evidence beyond a reasonable doubt that the defendant did herd his cattle upon the public highway as charged in the complaint herein, you should find the defendant guilty by your verdict."

And although so requested by plaintiff in error, the court refused to give, among others, the following instruction :

"2. The court instructs the jury that the words 'at large' as used in the statutes of this state, making it unlawful for any animal of the species of horse, ass, mule, cattle, sheep, goat, swine or geese to run at large, means without restraint or confinement as to such animals. And in this case if the jury believe from the evidence that the cows of the defendant were upon the highway, and while there their movements were being controlled by a person or persons in charge of said cows, then you are instructed that the cows of the defendant were not at large under the law of this state, and the jury are instructed to find the defendant not guilty."

The contention of counsel for the people is that permitting cows to graze upon the public highway, although they are under the care and control of an attendant, is prohibited by the statute, while counsel for plaintiff in error insist that permitting cows to graze on the highway adjacent to one's premises when they are in the care and under the control of an attendant who keeps them from interfering with the property of others, or the public travel, is not in violation of the statute.

The two sections of the statute are as follows :

"That hereafter it shall be unlawful for any animal of the species of horse, ass, mule, cattle, sheep, goat, swine or geese to run at large in the State of Illinois."

"Whoever, being the owner or having control of any

domestic animal of the species mentioned in section one of this act shall suffer the same to run at large, shall be fined not less than two dollars nor more than ten dollars for each offense. * * * The herding of any such animals upon uninclosed lands without the consent of the owner or person having control of such lands shall be deemed a running at large under this act."

We are satisfied that the statute does not apply to cows in the highway when they are under the care and control of an attendant who actually prevents them from trespassing upon the property of others and from interfering with public travel; for "running at large" means "strolling about without constraint or confinement; as, wandering, roving or rambling at will, unrestrained." (Anderson's Dictionary of Law.)

In Michigan it was held that "When cattle are in the public highway in charge of a person directing and controlling their movements, they are not running at large within the meaning of the statute." *Bertwhistle v. Goodrich*, 53 Mich. 457. The statute of that state made it the "duty of the overseer of highways to seize and take into his custody and possession, any animal forbidden to run at large, which may be running at large in any highway." And the court in the *Bertwhistle* case, *supra*, held that cattle in the highway in charge of a boy thirteen years old, who restrained them from running about at will, were not "running at large" within the meaning of that phrase.

In Massachusetts it was held that "The owner of land adjoining a highway, and who owns to the center thereof, doubtless has a right to depasture his land in the highway; but he can not, in virtue of this right, be exempted from the duty of preventing his cattle from going at large thereon without the care of a keeper, but is bound by the same law which is applicable to others." *Parker v. Jones*, 1 Allen (83 Mass.), 270.

The statute of this state was evidently intended to prevent the animals named therein from trespassing upon the property of persons not their owners and not having them in charge, or from otherwise annoying such, and whenever

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such animals are, by fences or keepers, kept under such control as to effect that purpose, they are not "running at large" within the meaning of the statute.

It follows that the court improperly gave the first instruction at the instance of the people; that it should have given the second refused instruction requested by plaintiff in error; and ought to have granted a new trial for the reason that the verdict was contrary to the evidence.

There being no dispute as to the facts, and under the view of the law applicable thereto that we entertain, the plaintiff in error not having violated the statute as charged, we have concluded to reverse the judgment with a finding of facts.

In making up the judgment, the clerk will incorporate therein that "the court finds that the plaintiff in error, George Morgan, did not willfully and maliciously permit certain cows to run at large in violation of the statute as charged in the complaint."

D. H. Clark v. University of Illinois.

1. *CONTRACTS—Rule of Construction.*—In a controversy as to the meaning of a contract the court will adopt the interpretation which the parties in their dealings together have seen fit to place upon it.

2. *APPELLATE COURT PRACTICE—Errors Raised for the First Time in the Appellate Court.*—A court of review will not reverse a judgment for an error that could have been corrected by the trial court and which is raised for the first time in the court of review.

Assumpsit, upon contract of employment. Error to the Circuit Court of Champaign County; the Hon. FRANCIS M. WRIGHT, Judge presiding. Heard in this court at the November term, 1901. Affirmed. Opinion filed June 20, 1902.

WOLFE & SAVAGE, attorneys for plaintiff in error.

J. L. RAY and T. J. SMITH, attorneys for defendant in error.

MR. JUSTICE HARKER delivered the opinion of the court.

This suit was brought by the plaintiff in error to recover for salary claimed to be due him as professor of military science and tactics in the University of Illinois for the school year of 1899-1900. A trial by jury resulted in a verdict and judgment in favor of the university.

There is but little dispute about the facts. The chief contention is over the interpretation of the contract of employment.

For many years prior to the late Spanish war, the position of professor of military science and tactics in the University of Illinois has been filled by an officer of the regular army, detailed from the active list and paid by the federal government. In 1898, the officer then in charge having been relieved by the war department and ordered to join his regiment, the plaintiff in error, an officer on the retired list, addressed a letter to President A. S. Draper, of the university, with a view to being retained for the place. The president replied that the university authorities preferred an officer on the active list, and again wrote that if they failed to procure a detail from the government before the following year, they would look for an officer on the retired list. Considerable correspondence between President Draper and the plaintiff followed, in which salary, tuition for the plaintiff's three children in the university, and other matters were discussed, resulting in a decision of the president to recommend to the trustees of the university, the appointment of the plaintiff at a salary of \$52.50 per month and remission of tuition fees for his children. The recommendation was made and the trustees, on June 13, 1899, made the appointment, but, not wanting to establish a precedent for admitting into the university the children of an instructor free of tuition, added to the \$52.50 the amount of tuition for three students per month, \$12.50, and fixed the salary at \$65 per month. It was understood at the time that the \$12.50 per month would be returned as tuition fees. The amount of \$52.50 was required to bring the salary which the plaintiff was at the time receiving as a

retired officer or army captain up to that of a captain on the active list. Early in July, the president and trustees opened a correspondence with the war department, requesting the plaintiff be restored to the pay of a captain on the active list and that he be detailed for service as military professor of the university. The correspondence was successful and the plaintiff was restored and detailed accordingly.

On September 15, 1899, plaintiff entered upon his service at the university and continued for the school year of ten months. Each month he received from the university the \$12.50 which was intended to cover the tuition of his children, until the following May, when he declined it and claimed that he was entitled to \$65 for each month of service. The university authorities denied the claim and insisted that as he had been restored to the pay of a captain on the active list and was filling a detail made by the government, the university owed him nothing on account of salary. This suit followed, with the result mentioned.

We see no merit in the plaintiff's suit. From the correspondence between him and President Draper he was given to understand that the military professor at the university had always been paid by the government, and that if he should be retained, it would be upon the same salary footing as of a captain on the active list. He was notified in September, within a few days after beginning service, that he had been restored to full pay, and was apprised of the fact that it had been accomplished at the instance of the university authorities. President Draper expressed to him, at the time, his gratification over the fact, as it would relieve the university from paying him a salary; to that view he expressed no dissent. When he applied for his first month's salary, Professor Shattuck, the business manager, told him that it was the understanding of the university authorities that there would be due him only \$12.50 per month, allowed for tuition for his children, as the \$52.50 would be paid by the government. To that he made no dissent, but claimed that as he was not restored to

full pay by the government until five or six days after he began service, he should, by the university, be paid for that time, amounting to \$12.25. The justness of that view was conceded by Shattuck, who added the amount to the \$12.50, making \$24.75, which was paid to the plaintiff and a receipt given therefor. We are here furnished with the strongest evidence that the plaintiff himself, was, early in his term of service, pleased to place upon his contract the same interpretation as that contended for by the defendant. The law is well settled that in a controversy as to the meaning of a contract, the court will adopt the interpretation which the parties in their dealings together have seen fit to place upon it. *Amer. & Eng. Ency. of Law*, Vol. 3, p. 867 (1st Ed.); *Lyles v. Leshner*, 7 West Rep. 51; *Jackson v. Conlin*, 50 Ill. App. 542; *Bishop on Cont.*, Sec. 412.

It is contended that all previous negotiations were merged in the order made by the trustees on June 13, 1899, which, it is insisted, constituted, with the acceptance of the plaintiff, the contract, and that therefore the court erroneously admitted in evidence the correspondence between the plaintiff and President Draper. We think the correspondence was properly admitted, for the reason that a portion of it, with the order of appointment, constituted the contract, and all of it was competent, as tending to show the intention of the parties and the true meaning of the contract. As to the contention that the plaintiff was entitled to a judgment of \$12.50, even upon the theory that the plaintiff's restoration to full pay relieved the university from paying him the \$52.50 per month, because he only received \$12.50 each month for the nine months of his service, we desire to say that it clearly appears from the evidence that the \$12.50 was not intended as salary, but was to be paid in lieu of free tuition for the plaintiff's three children, and it was understood that it was to be paid back as tuition. Owing to the fact that two of his children were too young to enter the university, only one attended, and his tuition amounted to only a few cents over forty dollars. As a matter of fact, then, he has

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received and retains about sixty dollars more than was due him, in accordance with the true understanding of the parties. It seems, too, that this point is raised for the first time in this court. Not by instruction to the jury, by motion for new trial, nor in any other way was this question raised in the Circuit Court. It comes too late, even if it had merit in it. It has been repeatedly held in this State that a court of review will not reverse a judgment for an error that could have been corrected by the trial court, and which is raised for the first time in the court of review.

The views above expressed render a discussion of the instructions unnecessary. Judgment affirmed.

Mr. Justice WRIGHT took no part.

Ed. Terry v. Mattoon Ice & Storage Company.

1. **PRINCIPAL AND AGENT**—*Principal Bound by Agent's Arrangement.*—T. rented a refrigerator room for the purpose of storing meat at his own risk. Afterward at plaintiff's request he stored some of plaintiff's meat therein without notice to the company of its ownership. Held, that plaintiff was bound by the agreement entered into between T. and the company and deposited his meat at his own risk.

Trespass on the Case.—Appeal from the City Court of Mattoon: the Hon. J. F. HUGHES, Judge presiding. Heard in this court at the November term, 1901. Affirmed. Opinion filed June 20, 1902.

JOHN S. HALL and ANDREWS & VAUSE, attorneys for appellant.

JAMES W. & EDWARD C. CRAIG, attorneys for appellee.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

This was an action on the case by appellant, Ed. Terry, against appellee, Mattoon Ice & Storage Company, which was tried in the city court of the city of Mattoon by jury, and resulted in a verdict and judgment in favor of appellee.

Appellant, having moved for a new trial, which was denied, took an exception, brings the case to this court by appeal, and urges a reversal of the judgment on the alleged grounds that the court admitted improper evidence for appellee, gave improper instructions for appellee, and that the verdict is against the weight of the evidence.

The case was tried on the declaration as amended, which charged that heretofore appellant was engaged at the city of Mattoon in the business of running a butcher shop, and in buying, killing and selling at retail, cattle, hogs and sheep, from which he was earning great profit; that as such butcher, he owned and possessed four fat cattle which were dressed for beef, and which he desired to put in cold storage until such future time as he should desire to sell it from his shop in the ordinary run of trade; that appellee was at the same time then and there possessed of and using a cold storage plant for keeping and preserving such butcher stock as appellant possessed; that on, to wit, December 18, 1900, appellant obtained of appellee storage in its plant for the meat of said four cattle which was then sound and in good condition; that it was the duty of appellee to keep said meat from spoiling and to preserve it from damage, so it would be fit for trade when appellant should desire to use it; yet appellee so negligently kept the meat that in a few weeks after it was put in the plant, it spoiled and became worthless; that appellant, not knowing that it had spoiled, took a portion of it to his shop and retailed it to his customers, who, discovering its condition, returned it to him. And that by reason of said negligence of appellee, the meat was wholly lost to appellant, and he deprived of great profits in his business, thereby being damaged to the amount of \$500.

Appellee pleaded not guilty.

The evidence shows that appellee, at and before the time in question, owned and operated an ice manufacturing plant in the city of Mattoon, and in conjunction therewith had a cold storage room and an ice room, the latter not being properly fitted for cold storage. For a long time prior to

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and during the time covered by the transaction in question in this case, the cold storage room was leased exclusively to C. W. Walker; and one J. W. Terry had the ice room leased at \$20 a month, he to look after the meat he put into it, and appellee to be free from all responsibility for its keeping. In September, 1900, J. W. Terry gave up the ice room, and at that time the manager of appellee offered to let him have it during the winter months for \$15, upon the same terms as before in other respects. J. W. Terry replied that he thought he could use the room then on those terms, and would let him know. The manager informed the employees at the plant of the offer made J. W. Terry, and instructed them to let him have the room when he wanted it. On December 18, 1900, J. W. Terry, at the request of appellant, Ed. Terry, 'phoned to appellee's plant inquiring if the ice room was empty, and being informed that it was, said he would send a man down with some meat to put in it. Shortly after this telephone message, appellant, with one Frank Kinser, came to the plant with a load of meat, and asked the engineer to tell him where the meat room was. The engineer inquired which room, and appellant replied that he had a load of meat for J. W. Terry, which they wanted to put into the room engaged by him. They were shown the ice room, where they hung the meat in question upon hooks brought with them for that purpose. The rent of the ice room was charged on the books to J. W. Terry at \$15 a month. At the expiration of one month after the meat had been hung in the ice room, appellee presented J. W. Terry with a bill for \$15 for the rent of the ice room for one month. J. W. Terry then informed appellee's manager that Ed. Terry (appellant) would pay it, as the meat belonged to him. This was the first intimation that any of the agents or employees of appellee had that it was appellant's meat, and not J. W. Terry's, that had been put into the ice room on December 18, 1900.

On January 11, 1901, appellant started a butcher shop in the city of Mattoon, and began offering to sell therefrom

the meat he had stored in the ice room, although it had decayed and was unfit for use. People would not buy the meat because of its spoiled condition, and in nine days thereafter appellant quit keeping the shop.

Appellant left some of his meat in the ice room until June, 1901, when, because of its offensiveness from decay, it was not permitted to remain there longer.

On the trial the court permitted appellee, over the objections of appellant, to show that appellee's manager had offered to let J. W. Terry put meat into the ice room at \$15 per month during the winter months at his (J. W. Terry's) risk before appellant got him to 'phone to the plant inquiring whether the ice room was empty, and that he would send a man with meat to put into it. It is contended that this was improperly admitted, for the reason that appellant was not present when the offer was made, and did not know of it when he put the meat into the ice room.

But we are of opinion that it was properly admitted, for the reason that when appellant procured J. W. Terry to arrange over the 'phone with appellee for putting the meat into the ice room, he bound himself to all the arrangements which were made between J. W. Terry and appellee respecting storing the meat there, and if appellee and J. W. Terry agreed that the meat was to be put there at the risk of the owner, appellant, in order to get his meat into the room, should not be permitted to represent that it was owned by J. W. Terry, and afterward claim it was not J. W. Terry's, but his, for the purpose of rendering appellee liable on account thereof, when it would not be liable to J. W. Terry on account of the agreement between him and appellee, which had been made in good faith and without any knowledge on the part of the agents and employes of appellee that the meat belonged to appellant, and not to J. W. Terry.

The verdict and judgment being proper under the evidence, renders it unnecessary for us to consider the objections argued against the rulings of the court on the instructions, and we will affirm the judgment.

W. F. Romines v. C. L. McFarland et al.

1. **PROMISSORY NOTES—Burden of Proof Where Defense is Payment.**
—Where a note is produced from the possession of plaintiff with a credit of twenty dollars indorsed upon it, a *prima facie* right to recover the balance apparently due upon it is established, and the burden of proving payment by the weight of the evidence is shifted to the defendants.

Assumpsit, upon a promissory note. Appeal from the County Court of Clark County; the Hon. J. C. PERDUE, Judge presiding. Heard in this court at the November term, 1901. Reversed and remanded. Opinion filed June 20, 1892.

DAVISON & BARTLETT, attorneys for appellant.

S. M. SCHOLFIELD and GOLDEN, SCHOLFIELD & BOOTH, attorneys for appellees.

MR. JUSTICE WRIGHT delivered the opinion of the court.

Appellant sued appellees before a justice of the peace upon a promissory note given by the latter, and the case having been removed by appeal to the County Court, a trial by jury ended in a verdict and judgment against appellant. This appeal is brought to reverse such judgment, and upon the record, the single question is presented whether the verdict is supported by the evidence.

The defense made against the note in the trial court was payment. When the note was produced from the possession of appellant, as it was, with a credit of twenty dollars indorsed upon it, a *prima facie* right to recover the balance apparently due upon it was established, and the burden of proving payment by the weight of the evidence was shifted to the defendants. McFarland, who was principal maker of the note, testified he had paid to appellant all that was due on the note on the occasion of a reunion of soldiers. Tomaw, a witness produced by defendants, testified that he was present when McFarland paid some money to appellant, and that the former told the latter at the time, such payment was for hay. Appellant denied that he had received any payment upon the note but the twenty dollars indorsed upon it. There was evidence tending to show

there was no reunion at the time of payment stated by McFarland, and that he testified at the trial before the justice of the peace he paid fifty-five dollars upon the note on the occasion of the reunion, he having stated on the final trial the amount was seventy-five dollars. This is substantially all the evidence contained in the record, and upon consideration we are constrained to believe the jury were in some way misled, or adopted a wrong conception of the evidence, for we are unable to say the weight of the evidence was with the appellees upon the fact of payment as claimed by them, but rather the evidence of their own witness, Tomaw, was to the effect the payment, if payment was made, was upon another account. For the reason stated the judgment of the County Court will be reversed and the cause remanded for a new trial.

Andrew Montz v. Emma H. Roberts.

1. *PRACTICE—Where Judgment of Trial Court Will Be Affirmed.*—Where the court instructs the jury liberally, fairly and fully in behalf of the defendant, and the testimony of plaintiff and her witnesses, if believed, is amply sufficient to sustain the conclusion arrived at by the jury, and this court is unable to discover sufficient evidence in that of defendant and his witnesses to justify this court in holding that the verdict is not in accordance with the weight of the evidence, the judgment will be affirmed.

Assumpsit, for breach of promise of marriage. Appeal from the Circuit Court of Coles County; the Hon. FRANK K. DUNN, Judge presiding. Heard in this court at the November term, 1901. Affirmed. Opinion filed June 20, 1902.

A. J. FRYER, J. P. HARRAH and J. H. MARSHALL, attorneys for appellant.

CLARK & SCOTT and J. W. & E. C. CRAIG, attorneys for appellee.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

This was an action of assumpsit by appellee, Emma H.

Montz v. Roberts.

Roberts, against appellant, Andrew Montz, to recover damages for a breach of promise of marriage, which was tried in the Circuit Court of Coles County by jury, and resulted in a verdict and judgment in favor of appellee for \$2,000. Appellant having moved for a new trial in the Circuit Court, and the same being denied, he excepted, brings the case to this court by appeal, and to secure a reversal of the judgment, insists that the verdict is against the weight of the evidence, and that the court refused proper instructions which he requested to be given.

The declaration charged that appellant had promised to marry appellee on the 7th day of March, 1901, but refused to do so, by reason of which she was damaged \$10,000.

Appellant interposed five pleas in bar of the action: first, the general issue; second, that when the alleged promise was made, "plaintiff was a woman of ill-temper, quarrelsome disposition and of immoral conduct, and unfit, by reason thereof, of becoming the wife of defendant, all of which was at the time aforesaid, unknown to him;" third, "that before and at the time of the making of the said supposed promise, the plaintiff was a woman of lewd and immoral conduct, ill-tempered, quarrelsome, and unfit to be the wife of defendant, all of which was then and there unknown to the defendant;" fourth, "that at the time of making the said supposed promise, the said plaintiff was a woman of unchaste character and reputation, all of which was then and there unknown to the defendant;" and fifth, "that at the time of making the said supposed promise, the said plaintiff was a common liar and her reputation for truth and veracity was bad; and all of which was then and there unknown to the defendant."

Issue was joined on the first plea, and the others were traverse and issue joined.

The evidence shows that appellee is forty-one years old, lived with her father at Saulsbury, Clark county, Illinois, and had lived there since she was four years old, except for about five years, when she lived in Cumberland county with her husband, from whom she obtained a divorce, and

afterward he died, in 1897. Appellee had one child as the result of her marriage.

Appellant is a widower, having had two wives, both of whom are dead, and he is the father of ten children. He has lived on a farm in Coles county, Illinois, since 1861, and was acquainted with appellee's father and her widowed sister, who also lived with the father, but up to October, 1900, had never met appellee.

In October, 1900, Mr. Reynolds, an acquaintance of both appellee and appellant, had a talk with the latter at his home, in which he (appellant) told Reynolds that he was getting tired of living on the farm without a wife and wanted to get one. Reynolds, a short time afterward, met appellee, and in a joking way, told her that appellant, a nice old man, being sober, steady and industrious, wanted a wife, and asked her if he might tell him to call on her, and she said he could. A short time afterward, appellant went to see appellee at her father's home where he met her for the first time. He told her that Mr. Reynolds told him that she was willing to let him come and see her, and upon his asking her if it was so, she told him yes. When he went to go home after his first visit, he wanted to know of appellee if she objected to his coming to see her again, and upon being told that she did not, he said he would come again.

In a short time afterward he went to see her again, and they talked with each other several hours, and when he left that time, he told her he would call again.

In the early part of February, 1901, he went to visit appellee again, and she swears that during that visit he and she made an agreement to get married on the 7th of March, 1901, and that he then asked and obtained her father's consent to their getting married.

The father and sister of appellee both corroborate appellee to the extent that appellant said to the father that he and appellee had concluded to get married, and he would like to obtain the father's consent to such marriage, and that the father gave his consent.

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Appellant, in his testimony, admits visiting appellee, as claimed by her, and says that when he visited her the latter part of January, or the fore part of February, 1901, he said to her, "Emma, you wouldn't marry me, I'm too old;" and she said, "Yes, I would," and that then he asked her when it would suit her to get married; and she looked at a calendar and said "About the 7th of March;" and that "I told her if there was nothing come up twixt now and then I didn't know anything about, I would come down and tell her whether we would get married or not, and she said, 'All right.'" That "her father came into the room soon after, and I asked him if he had any objection to Emma and me getting married; that we had been talking something of it; and he said he didn't."

On the 22d of February, 1901, appellant called early in the morning upon appellee and told her that she was not the woman for him to marry and wanted to pay her \$50, and said "he hadn't damaged her any more than that he supposed." She refused to receive the \$50, and on September 18, 1901, commenced this suit.

There was some evidence tending to impeach the general reputation of appellee for truth, veracity, and chastity, which was met by other evidence tending to show that her general reputation for truth, veracity and chastity was good.

The court instructed the jury liberally, fairly and fully in behalf of the appellant, and only refused such instructions as were requested by him which were either improper or were covered by those which were given.

The testimony of appellee and her witnesses, if believed, is amply sufficient to sustain the conclusion arrived at by the jury, and we are unable to discover sufficient evidence in that of appellant and his witnesses to justify us in holding that the verdict is not in accordance with the weight of the evidence, and therefore the judgment ought to, and will be affirmed.

Albert Rothschild, Surviving Partner, etc., v. Max Sessell, Executor, etc.

1. **EVIDENCE—*Firm Account Books—Accounts for Money Lent.***—The usual probative force of accounts kept in books in the usual course of dealings between parties as regards transactions of merchandise and the like does not apply to an account for money lent, as that is not usually the subject-matter of an account, notes being usually taken.

2. **STATUTE OF LIMITATIONS—*How Bar is Removed.***—In order to remove the bar of the statute, it is necessary for the jury to find from the evidence that not only had payments been made, but that they had been made upon the identical account sued upon with the intention thereby of recognizing the entire account.

Claim in Probate.—Appeal from the Circuit Court of Macoupin County; the Hon. ROBERT B. SHIRLEY, Judge presiding. Heard in this court at the November term, 1901. Affirmed. Opinion filed June 20, 1902. *

RINAKER & RINAKER, attorneys for appellant.

The bar of the statute of limitations is removed by new promises or a mere payment of money as a part of a larger sum and it is not the law that such new promise or payment must also be made "with the purpose and intention of acknowledging" a greater indebtedness than the sum so paid. The law implies the intention and purpose from the fact of an intentional part payment only, and a new promise is the expression of such a purpose and intention. *Wellman v. Miner*, 179 Ill. 326; *Lowery v. Gear*, 32 Ill. 383; *Kallenbach v. Dickinson*, 100 Ill. 427; *Ditch v. Vollhardt*, 82 Ill. 134; *Miner v. Lorman*, 56 Mich. 212; 19 A. and E. Ency. Law, 323 and notes; 2 Greenleaf, Evidence, Sec. 344.

BELL & BURTON, attorneys for appellee.

The acknowledgment and promise to pay the debt in order to avoid the bar of the statute, must arise out of such facts as identify the debt with such certainty as will clearly determine its character, fix the amount due and show a present, unqualified willingness and intention to pay it. *Waldron et al. v. Alexander*, 136 Ill. 562; *Collar v. Patterson*, 137 Ill. 403; *Kallenbach v. Dickinson*, 100 Ill. 427.

Proof of payment alone will not remove bar of statute of limitations. A payment alone admits only so much debt as it pays. *Miller v. Cinnamon*, 168 Ill. 447; *Kallenbach v. Dickinson*, *supra*; *Crum v. Higold*, Adm'r, 32 Ill. App. 282; *Parsons on Contracts*, 6th Ed., Vol. 3, 74, 75.

The rule as to admission of books of account would not apply to an account for money lent as that is not usually the subject-matter of account, notes being generally taken. *Boyer v. Sweet*, 3 Scam. 120.

The rule there (*Boyer v. Sweet, supra*) has been repeatedly recognized by subsequent decisions of this court, and without any modification. It must therefore be regarded as the settled law of the court. *Ruggles v. Gatton*, 50 Ill. 416; *Kibbe v. Bancroft*, 77 Ill. 18; *House v. Beak et al.*, 141 Ill. 299; *Schwarze v. Roessler*, 40 Ill. App. 474.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

This was a claim filed in the County Court of Macoupin County, June 29, 1899, by Julius Rothschild and Robert Rothschild, partners doing business as Rothschild Bros., against the estate of Peter J. Hendgen, deceased, then being administered in that court by Marcus Sessell, the executor of the last will and testament of said deceased, who died in the spring of 1898.

The claim, when filed, was as follows:

" \$3,000.00.

ST. LOUIS, MO., Aug. 26, 1878.

Ninety days after date, I promise to pay to the order of J. Meyberg & Co., three thousand dollars, for value received, with interest at the rate of eight per cent per annum from date.

(Signed) P. J. HENDGEN.

(Endorsements.)

"Pay to the order of Rothschild Bros.

MEYBERG & ROTHCHILD BROS.

J. Meyberg & Co.

CREDITS.

Paid on account :

July	2, '85	\$27 30
Aug.	6, '85	13 25
Sept.	5, '85	7 75

Paid on account :

Jan'y 5, '86.....	\$10 90
Feb. 5, '86.....	17 25
Mar. 5, '86.....	3 40
Apr. 5, '86.....	1 00
July 7, '86.....	13 25
Oct. 5, '86.....	6 37
Jan. 4, '87.....	24 00
Feb. 5, '87.....	28 70
July 1, '87.....	45 00
Aug. 5, '87.....	4 00
Oct. 5, '87.....	7 00
Nov. 5, '87.....	4 00
Jan. 5, '88.....	13 00
Feb. 6, '88.....	16 55
Mar. 5, '88.....	7 65
Apr. 5, '88.....	9 60
May 5, '88.....	3 00
July 5, '88.....	66 70
Jan. 5, '89.....	19 60
Feb. 9, '89.....	22 65
Mar. 5, '89.....	1 55
July 5, '89.....	36 96
Aug. 5, '89.....	1 35
Oct. 5, '89.....	8 25
Nov. 5, '89.....	1 50
Dec. 5, '89.....	2 65
Jan. 6, '90.....	24 50
Feb. 5, '90.....	11 45
July 7, '90.....	32 65
Aug. 5, '90.....	3 45
Sept. 5, '90.....	3 95
Dec. 5, '90.....	3 56
Jan. 5, '91.....	25 30
Feb. 5, '91.....	7 50
May 5, '91.....	1 70
July 6, '91.....	26 50
Aug. 5, '91.....	5 00
Oct. 5, '91.....	4 90
Dec. 5, '91.....	3 55
Jan. 5, '92.....	13 00
Feb. 5, '92.....	3 75
July 5, '92.....	43 25
Aug. 5, '92.....	15 75
Dec. 5, '92.....	6 25
Jan. 5, '93.....	30 37

Rothschild v. Sessell.

Paid on account :

Feb. 6, '93.....	\$15 53
Apr. 3, '93.....	2 50
June 5, '93.....	12 50
July 5, '93.....	23 12
Dec. 5, '93.....	6 25
Jan. 6, '94.....	19 05
June 5, '94.....	9 70
Aug. 6, '94.....	1 40
Dec. 5, '94.....	3 85
Jan. 5, '95.....	13 55
Mar. 5, '95.....	5 80
June 5, '95.....	5 50
July 5, '95.....	10 90
Sept. 5, '95.....	11 80
Nov. 5, '95.....	2 00
Dec. 5, '95.....	15 80
Jan. 6, '96.....	15 00
Mar. 6, '96.....	2 75
Apr. 7, '96.....	4 10
June 5, '96.....	5 00
Sept. 7, '96.....	2 00
Dec. 5, '96.....	9 40
Jan. 6, '97.....	6 70
June 5, '97.....	22 00
Dec. 3, '97.....	16 50
Jan. 5, '98.....	12 65
Feb. 5, '98.....	2 20

Total.....\$1,015 67

STATE OF ILLINOIS, } In the County Court of Macou-
Macoupin County, } ss. pin County, June term, A. D.
1899.

Julius Rothschild for Rothschild Bros., being duly sworn, on oath says that the annexed account against the estate of Peter J. Hendgen, deceased, amounting to the sum of sixty-nine hundred and eighty-four dollars and thirty-three cents, is due and unpaid after allowing all just credits. (\$6984.33.)

(Signed) JULIUS ROTHSCHILD.

Subscribed and sworn to before me this 29th day of June, 1899.

O. C. HARTLY, Clerk."

And afterward, on March 6, 1900, said claim was amended so that it was as follows :

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Rothschild v. Sessell.

"St. Louis, February 26, 1900.

Peter J. Hendgen Estate, in account with Rothschild Bros.

1877.		
Sept.	6, cash	\$400 00
"	18, "	500 00
"	20, "	700 00
"	21, "	1,000 00
"	25, "	1,000 00
Oct.	9, "	1,000 00
Nov.	27, "	500 00
Dec.	31, interest	102 00
1878		
Feb.	11, cash	125 00
Mar.	2, "	300 00
"	21, "	200 00
"	26, "	100 00
Apr.	18, "	250 00
"	29, "	250 00
June	8, "	400 00
July	9, "	500 00
"	10, "	1,004 00
"	11, "	502 05
"	10, "	501 30
"	21, "	503 95
"	23, "	500 90
"	24, "	600 00
"	25, "	1,000 00
"	26, "	1,000 00
"	31, "	1,000 00
Aug.	26, "	31 00
Dec.	31, interest	529 38
1881.		
Nov.	18, cash	1,938 84
Total		\$16,439 02

1877.			CREDIT.
Dec.	1, by cash	\$1,000 00	
"	31, by note	2,000 00	
"	31, interest	164 44	
1878.			
June	25, by cash	600 00	
July	1, " "	1,000 00	
Aug.	16, " "	1,000 00	
1885.			
July	2, " "	27 30	

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Rothschild v. Sessell.

Aug.	6,	by cash.....	\$13 25
Sept.	5,	" "	7 75
1886.			
Jan.	5,	" "	10 95
Feb.	5,	" "	17 25
Mar.	5,	" "	3 40
Apr.	5,	" "	1 00
July	7,	" "	27 00
Aug.	5,	" "	13 15
Oct.	5,	" "	6 37
1887.			
Jan.	4,	" "	24 00
Feb.	5,	" "	28 70
July	1,	" "	45 00
Aug.	5,	" "	4 10
Oct.	5,	" "	7 00
Nov.	5,	" "	4 00
1888.			
Jan.	5,	" "	13 00
Feb.	6,	" "	16 55
Mar.	5,	" "	7 65
Apr.	5,	" "	9 60
May	5,	" "	3 00
July	5,	" "	66 70
1889.			
Jan.	5,	" "	19 60
Feb.	5,	" "	22 85
Mar.	5,	" "	1 55
July	5,	" "	36 96
Aug.	5,	" "	1 35
Oct.	7,	" "	8 25
Nov.	5,	" "	1 50
Dec.	5,	" "	2 65
1890.			
Jan.	6,	" "	24 50
Feb.	5,	" "	11 45
July	5,	" "	32 65
Aug.	5,	" "	3 45
Sept.	5,	" "	3 94
Dec.	5,	" "	3 56
1891.			
Jan.	5,	" "	25 30
Feb.	5,	" "	7 50
May	4,	" "	1 70
July	6,	" "	26 50
Aug.	5,	" "	5 00

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Rothschild v. Sessell.

Oct.	5,	by cash	\$5 90
Dec.	5,	" "	3 55
1892.				
Jan.	5,	" "	13 00
Feb.	5,	" "	3 75
July	5,	" "	43 75
Aug.	5,	" "	.....	15 75
Dec.	5,	" "	.....	6 25
1893.				
Jan.	5,	" "	.....	30 37
Feb.	6,	" "	.....	15 53
Apr.	3,	" "	.....	2 50
June	5,	" "	.....	12 50
July	5,	" "	.....	40 00
Aug.	5,	" "	.....	23 12
Dec.	5,	" "	.....	5 25
1894.				
Jan.	6,	" "	.....	19 05
June	5,	" "	.....	9 70
Aug.	6,	" "	.....	1 45
Dec.	5,	" "	.....	3 85
1895.				
Jan.	5,	" "	.....	13 55
Mar.	5,	" "	.....	5 80
June	5,	" "	.....	5 50
July	5,	" "	.....	10 90
Sept.	5,	" "	.....	11 80
Nov.	5,	" "	.....	2 00
Dec.	5,	" "	.....	15 80
1896.				
Jan.	6,	" "	.....	15 00
Mar.	3,	" "	.....	2 75
Apr.	7,	" "	.....	4 10
June	5,	" "	.....	5 00
Sept.	7,	" "	.....	2 00
Dec.	5,	" "	.....	9 40
1897.				
Jan.	6,	" "	.....	6 70
June	5,	" "	.....	22 00
Dec.	6,	" "	.....	16 50
1898.				
Jan.	5,	" "	.....	12 65
Feb.	5,	" "	.....	2 20
Total credits.....				<u>\$6,780 11</u>

Rothschild v. Sessell.

Amount debtor forward.....	\$16,439 82
Amount credits forward.....	6,780 11
	<hr/>
	\$ 9,659 71

STATE OF MISSOURI, }
 City of St. Louis, } ss.

Before me, W. L. Kingsland, a notary public, duly commissioned and qualified in and for the City of St. Louis, State of Missouri, on this day personally appeared Julius Rothschild, who, after being by me duly sworn, stated on his oath that he is a member of the firm of Rothschild Brothers, which is composed of Albert Rothschild and Julius Rothschild, and that the foregoing and annexed open account in favor of Rothschild Bros., and against said Peter J. Hendgen estate, showing the amount due of \$9,659.71, ninety-six hundred and fifty-nine and 71-100 dollars, is within the knowledge of affiant just, true and unpaid; that the said sum of ninety-six hundred and fifty-nine and 71-100 dollars is now due and owing said Rothschild Bros., and that all just and lawful offsets, payments and credits have been allowed.

(Signed) JULIUS ROTHSCHILD.

Sworn to and subscribed before me this, the fifth day of March, A. D. 1900.

My commission expires Feby. 11, 1903.

(Signed) W. L. KINGSLAND,
 Notary Public."

(L. S.)

The claim was objected to by the executor, and after being heard in the County Court, was there disallowed. It was then taken to the Circuit Court where it was tried by jury and resulted in a verdict and judgment in favor of the estate.

Before it was tried in the Circuit Court, Julius Rothschild died and the claim was thereafter prosecuted in the name of Albert Rothschild, the surviving partner, who, after the verdict had been returned against him, moved for a new trial, which was overruled and a judgment rendered disallowing the claim, to which the claimant excepted; and he has brought the case to this court by appeal, and to reverse the judgment, insists that the court improperly ruled on the evidence and instructions; that counsel for the estate made improper remarks when stating and arguing

the case to the jury, and that the verdict and judgment are against the law and evidence.

The bill of exceptions shows that before the trial, claimant abandoned all claim upon the note upon which the claim was first founded, and relied only upon the account stated in the claim as amended.

In support of the claim, the account books of Rothschild Bros. were received in evidence, and they showed on the dates mentioned in the amended claim, the items there charged were entered on the books as charges to P. J. Hendgen, substantially as specified in the claim as amended, except that in some instances the item on the books showed "cash," and in others "ch.," but most of them only the date, followed by the name P. J. Hendgen, and in the dollars and cents columns the figures in amounts as shown by the amended claim.

The account books were shown to be those of Rothschild Bros., kept in the course of their business selling hats in the city of St. Louis, and the bookkeeper who kept their books from 1884 to the time Hendgen died and afterward, testified that the entries made in the books as charges against Hendgen prior to 1884 were in the handwriting of the bookkeeper who preceded him; that he was dead before the trial, and that often when P. J. Hendgen paid the items with which he is credited on the books after 1884, he would say that credit be given him on the "old matter;" on the "old account."

It was also shown that the items credited from 1885 forward, were for commissions due Hengden as insurance broker on premiums for insurance which were given him by or through Rothschild Bros., and that Hendgen had often said that if they would give him more insurance, he could and would pay them more on the "old account."

The executor showed that after the claim had been filed and before it was amended, Julius Rothschild told him that the estate only owed Rothschild Bros. the balance of the note upon which the claim was based.

There were no checks or notes put in evidence to explain or add to the showing made by the books.

The executor invoked the statute of limitations against the claim. At the request of the executor, the court instructed the jury to the effect that if they believed from the evidence that the several items of indebtedness claimed by the claimant were all more than five years past due when the claim therefor was filed in the County Court, then they should find for the estate unless they further believed from the evidence that Hendgen, within five years prior to the filing of the claim in the County Court, promised to pay the same or made partial payments thereon, with the intention or purpose of acknowledging the entire account; and at the instance of the claimant, refused to instruct the jury that a part payment on the account in question by Hendgen within five years before the claim was filed would alone be sufficient to hold the statute of limitations.

The account books of the firm alone were not sufficient to prove that the entries therein of cash or check charged to the decedent by the firm, were that much money loaned to him by them, for the reason that the usual probative force of accounts kept in books in the usual course of dealing between parties as regards transactions of merchandise and the like "do not apply to an account for money lent, as that is not usually the subject-matter of an account, notes being generally taken." *Boyer v. Sweet*, 3 Scam. 120; *Ruggles v. Gatton*, 50 Ill. 412; *Kibbe v. Bancroft*, 77 Ill. 18; *House v. Beak*, 141 Ill. 290; *Schwarze v. Roessler*, 40 Ill. App. 474; and *Smith v. Rentz*, 15 L. R. A. 138.

And under all the evidence, it seems to us the jury were warranted in concluding that the claim had not been satisfactorily established.

The rulings of the court on the instructions were proper; for in order to remove the bar of the statute, it was necessary for the jury to find from the evidence that not only had the decedent made payments to the firm as claimed by them, but also that he had made them upon the identical account sued upon, with the intention thereby of recognizing the entire account. *Miller v. Cinnamon*, 168 Ill. 447.

Some of the remarks of counsel for the estate should not have been made to the jury, and upon objection being made

Littlejohn v. Huff.

Jas. H. Mills, five hundred eighteen dollars, at Lewistown, Illinois. For value received, with interest at 7 per cent per annum.

(Signed) F. E. HUFF,
M. A. GRAFTON,
J. N. GRAFTON."

And upon the back of which was written "Interest paid on the within note up to April 1, A. D. 1900."

The defense which appellees interposed was payment, accord and satisfaction.

By agreement of parties, the case was tried by the court without a jury and resulted in a finding and judgment in favor of appellees.

Appellant excepted to the judgment, and, to effect a reversal, brings the case to this court by appeal, and insists that the court erred in recalling the witness Barnett, and hearing further testimony from him two days after the testimony had been closed, and after the case had been argued and submitted for decision; and that the finding and judgment are not supported by the evidence.

It appears that appellant's testator, James H. Mills, died on January 25, 1901, and appellant qualified as executor of his will in March following, and since then has acted as such. Shortly after he became executor, appellant found the note in question in an iron safe in the store room in the city of Lewistown where his testator was conducting a store before and up to the time of his death. The note was with some other papers and contracts pertaining to the business of the firm of F. E. Huff & Co., who conducted a cigar factory on the second floor of the same building in which Mills had his store.

The firm of F. E. Huff & Co. was a copartnership consisting of Mills (the testator) and Huff, one of the appellees; and it was organized April 1, 1900, with a capital of \$1,665.98 (of which Mills contributed \$1,147.98 and Huff \$518); was to continue five years, and was engaged in the business of manufacturing and selling cigars in the city of Lewistown from the time it was formed until Mills died, and thereafter Huff continued the business as the surviving partner.

At the time the copartnership agreement between Mills and Huff was reduced to writing, they had a talk in the presence of the witness A. M. Barnett (the lawyer who wrote the agreement), in which the amount that Huff owed Mills when the copartnership was formed, was talked over, and it was agreed that Huff, at that time, owed Mills the note in question, \$518, on a written contract dated May 25, 1898, some interest on both, and some rent, which all together amounted to \$1,147.98; and that they agreed that that sum should constitute the capital that Mills contributed to the firm, and that Huff had contributed \$518 as his share of said capital.

In January, 1900, while Huff was conducting the business of manufacturing and selling cigars on the second floor of the building in which Mills kept a store, Mills had a talk with the witness Belts, in which Mills told him that Huff owed him (Mills) \$518 on the note in question, and \$518 on a contract dated May 25, 1898, amounting all together to \$1,036, and, upon which there was due \$114.85 as interest from May 25, 1898, to January 1, 1900; that he also owed him \$77.50 rent from September 14, 1898, to January 1, 1900, making a total indebtedness of \$1,228.35. And told him further, that he, Mills, was going to make a new agreement with Huff for five years.

Prior to April 1, 1900, appellee Huff owned the cigar business and conducted it on his own account. The copartnership agreement provides that the business of the firm "shall be conducted under the firm name of F. E. Huff & Co.; * * * that said Huff shall have the full charge and management of the firm business of the copartnership subject to the supervision and direction of the said Mills, and that said Huff shall pay all the expenses of running said cigar factory, including hired help of cigar makers, stock, rents, and all other incidental expenses connected with the business, and shall have all the profits arising therefrom, and shall annually pay to the said Mills, interest at the rate of seven per cent per annum on said sum of \$1,147.98 so invested by the said Mills as capital stock."

On May 25, 1898, Mills and Huff entered into a written

Littlejohn v. Huff.

contract which recited that Mills had that day loaned and advanced \$518 to Huff, and by the terms thereof, Huff agreed that Mills should become the owner of a sufficient amount of the stock in the cigar factory of Huff, then located in the city of Lewistown, Illinois, to secure the payment of said money in one year, with interest from May 25, 1898.

After the evidence had been closed, and the case argued on both sides, the court took it under advisement, and two days thereafter the witness Barnett was recalled by the court of his own motion, and, over the objection of counsel for appellant, he was further interrogated by the court concerning the conversation between Mills and Huff at the time the copartnership agreement was written, but nothing new or different was elicited other than what the witness had testified to before.

Appellant testified that after the death of Mills, appellee Huff had told him that he (Huff) owed the estate a note and requested that he (Huff) be not pushed to pay it as it would break him up; but Huff denied ever having said so.

After the death of Mills, Huff, as the surviving partner of the firm of F. E. Huff & Co., accounted to the estate of Mills for the business done by him as such surviving partner; and appellant, as executor of the will of Mills, inventoried the share of his testator in the property of the firm of F. E. Huff & Co., as an asset of the estate of Mills.

We are satisfied that the trial court properly found that the note in question had been settled between Mills and Huff by way of accord and satisfaction when the copartnership was formed between them; and that the further examination by the court of the witness Barnett, after the evidence had been closed and the case argued, worked no prejudice against appellant, for the reason that nothing was elicited from the witness on such further examination that was new or different from what he had testified to when examined during the trial.

Finding no prejudicial error was committed by the trial court in this case, and that the evidence supports the finding and judgment, the latter will be affirmed.

Daniel B. Stivers v. James H. Conklin.

1. *APPELLATE COURT PRACTICE—Where Court Will Not Hold Finding Against Evidence.*—Where the evidence is conflicting, an appellate court will not hold that the finding is against the evidence and reverse the judgment, for the reason that the trial judge, who saw the parties, and observed their appearance and manner of testifying, could better determine which should be believed.

2. *PRACTICE—Admission of Further Evidence by the Court After the Taking of Evidence Has Been Closed.*—The admission of further evidence by the court after the taking of evidence has been closed, the arguments heard and the case submitted, is within the sound discretion of the trial judge, and in the absence of anything appearing which indicates that defendant was in any manner prejudiced thereby, such admission will not call for a reversal of the judgment.

Assumpsit, for broker's commissions. Appeal from the Circuit Court of DeWitt County; the Hon. WILLIAM G. COCHRAN, Judge presiding. Heard in this court at the November term, 1901. Affirmed. Opinion filed June 20, 1902.

E. B. MITCHELL and JOHN FULLER, attorneys for appellant.

EDWARD J. SWEENEY, attorney for appellee.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

Appellee, James H. Conklin, sued appellant, Daniel E. Stivers, before a justice of the peace of DeWitt county, for the sum of \$100, which appellee claimed that appellant owed him for commissions as a real estate broker in procuring a purchaser for certain real estate which appellant desired to sell.

After the case was tried by the justice, it was taken to the Circuit Court by appeal, and there, by consent of the parties, was tried by the court without a jury, resulting in a finding and judgment in favor of appellee for \$100.

Appellant having excepted to the judgment brings the case to this court by appeal and urges its reversal on the grounds that, as he claims, the finding and judgment are

against the evidence; that the court improperly held certain propositions of law in behalf of appellee that were not applicable to the evidence; improperly refused propositions submitted by appellant that were applicable, and improperly heard further evidence after the taking of testimony had been closed, the case argued and submitted.

The record shows that all of the evidence in the case consists of the testimony of witnesses who were before the judge who heard the case.

Appellant being desirous of selling his residence, had a talk with appellee, a real estate broker, in which it was arranged that appellee should endeavor to procure a purchaser for it, for which he was to be paid. What was to be paid and the terms of sale are somewhat in doubt, for there was an irreconcilable conflict in the evidence in that respect. But there is no dispute that appellee was the procuring cause of appellant obtaining a purchaser, at whose request appellant afterward sold and conveyed the property to his wife for the price he was asking for it at the time he arranged with appellee to find him a purchaser.

If appellee's version of the agreement which he and appellant made concerning the sale of the property, and what was afterward done by the parties, be believed, then the finding and judgment ought to stand; but if appellant's version be believed, then the finding is against the evidence, and the judgment should be reversed. Such being the case, the rule is that an appellate court will not hold that the finding is against the evidence and reverse the judgment, for the reason that the trial judge, who saw the parties, and observed their appearance and manner of testifying, could better determine which should be believed.

Counsel for appellant, in their printed brief and argument, state in general terms that the propositions of law which the court held for appellee do not, in their terms, state the law applicable to the evidence in the case, while those requested by appellant, and refused by the court, do. But they have not, as they should, pointed out wherein those so held are in fact improper, or wherein those refused

are proper in the respect claimed. We have read both sets of propositions, however, and do not find that the rulings of the court thereon were prejudicial to appellant.

The admission of further evidence by the court after the taking of evidence had been closed, the arguments heard and the case submitted, was within the sound discretion of the trial judge, and, in the absence of anything appearing which indicates that appellant was in any manner prejudiced thereby, we can not see how the admission of further evidence then was such an abuse of that discretion as to call for a reversal of the judgment on that account. *Indiana, Decatur & Western Ry. Co. v. Hendrian*, 190 Ill. 501, and cases there cited.

There being no prejudicial error found in the record, the judgment will be affirmed.

The City of Danville v. Thomas Noone.

1. *ORDINANCES—Privileges Granted Must be Open to All upon Equal Terms.*—When privileges are granted by an ordinance of a city, they must be open to the enjoyment of all persons similarly situated upon equal terms and conditions, and an ordinance framed so as to grant such privileges to some and refuse them on equal terms to others, is invalid for being unreasonable, oppressive, and creating a monopoly.

2. *SAME—Designating Cab Stands at Depots.*—A city ordinance contained the following: The city marshal shall designate stands for all cabs, coaches, omnibuses, or other vehicles at all railroad depots, where the same shall stand while waiting for passengers or property; and shall also designate and fix the stands at other points in the city where all drays, carts, coaches, cabs or other licensed vehicles shall stand while waiting for passengers or employment; and said city marshal shall make all necessary rules and regulations for the use and occupation of said stands by such licensed vehicles. *Held*, that such provision does not authorize the chief of police (formerly the city marshal) of the city to designate certain stands at a depot, which are more conveniently located for receiving and discharging persons and property, to be used exclusively by the licensed vehicles of one company, and require the licensed vehicles of other persons to occupy at that depot, other stands which are less conveniently situated for the same purpose, irrespective of whether the vehicles of the one or the other arrive first,

City of Danville v. Noone.

Prosecution Under City Ordinance.—Appeal from the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge presiding. Heard in this court at the November term, 1901. Affirmed. Opinion filed June 20, 1902.

MABIN & CLARK, attorneys for appellant.

GEORGE T. BUCKINGHAM, attorney for appellee.

An ordinance which makes an act done by one penal, and done by another under the same circumstances not penal, is illegal and void. An ordinance which creates a monopoly is illegal and void. *Dillon, Municipal Corporations*, Sec. 332; *City of Chicago v. Rumpff*, 45 Ill. 90-96; *Tugman v. City of Chicago*, 78 Ill. 405; *Zanone v. Mound City*, 103 Ill. 553-6; *Hibbard v. Chicago*, 173 Ill. 91.

An ordinance which prevents one citizen from engaging in a particular business, in a certain locality, under a penalty, while another is permitted to engage in the same business in the same locality, is not only unreasonable and void, but its direct tendency is to create a monopoly, which the law will not tolerate. *Tugman v. Chicago*, 78 Ill. 405; *City of Cairo v. Feuchter*, 159 Ill. 155; *City of Lake View v. Tate*, 130 Ill. 247; *City of Bloomington v. Wahl*, 46 Ill. 489; *City of Chicago v. Netcher*, 183 Ill. 104; *Cicero Lumber Co. v. Cicero*, 176 Ill. 1-27.

All ordinances should operate on all alike. It can not be left to the uncontrolled will of one man to apply it to one and to exempt another from its provisions. In such case he becomes a law-giver, which can not be tolerated. Any ordinance which vests the power in an officer to say that one shall, and another shall not, do a certain thing, is illegal and void. *Dillon, Municipal Corp.*, Sec. 321; *McGregor v. Lovington*, 48 Ill. App. 211; *City of Chicago v. Trotter*, 136 Ill. 430; *Cicero Lumber Co. v. Cicero*, 176 Ill. 1-27; *City of Cairo v. Coleman*, 53 Ill. App. 680.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

The city of Danville brought suit against Thomas Noone before a justice of the peace of Vermilion county on May

25, 1901, to recover \$50 as a penalty for his alleged violation of the ordinance of the city which provides for the licensing and regulating of persons keeping and using vehicles of any kind for the carrying of persons or property for hire within the city. After the case was tried before the justice of the peace, it was taken to the Circuit Court by appeal, and there tried by the court without a jury on a written statement of facts by consent of parties, and resulted in a judgment in favor of the defendant. The city having excepted to the judgment, brings the case to this court by appeal and insists that the same ought to be reversed for the alleged reason that it is against the law applicable to the facts in the case:

The statement of facts is as follows:

"The plaintiff, the city of Danville, is a municipal corporation, duly incorporated and existing under and by virtue of the laws of the State of Illinois. On May 1, 1901, and before then, the city of Danville had in full force and effect a certain ordinance in the words and figures following, to wit:

'Section 1. No person shall keep or use for hire for the carrying of persons or property any vehicle of any kind or description, within the city of Danville, without first obtaining a license therefor, under a penalty of not less than \$5, nor more than \$50 for each offense; Provided, this section shall not apply to liverymen hiring out vehicles to persons for single trips, or in the course of the usual or ordinary business of liverymen; nor shall the same apply to merchants, lumbermen and other persons who keep and use vehicles for the delivery of property sold by them and delivered to the purchasers thereof free of charge; nor shall the same apply to teams hired by the day or week, and not engaged in carrying passengers.

Section 2. There shall be charged and paid for a license under this chapter the following rates:

First. For omnibuses running between the hotels and railroad depots and other parts of the city the sum of \$5 per annum for each omnibus.

Second. For each hackney coach or other two-horse carriage, wagon, hack or vehicle used for carrying passengers, the sum of \$5 per annum.

Third. For each cab or other one-horse vehicle used for carrying passengers, the sum of \$5 per annum.

Fourth. For each truck, dray or other vehicle used for carrying freight or property, the sum of \$1 per annum.

Fifth. For each hackney coach, cab, omnibus, hack, carriage or other vehicle running transiently in the city during fair time and other days when there is a public demonstration in the city, the sum of \$5 per day shall be charged for each vehicle carrying passengers for hire.

Section 3. Every person keeping or using any vehicle requiring a license shall cause the number of the license of such vehicle to be conspicuously painted or placed upon the same where it can be readily seen; and any person neglecting or refusing so to do shall be fined not less than \$3 nor more than \$25.

Section 4. No person shall be entitled to a license under this chapter except such person is a resident of Danville township, and over the age of twenty-one years, and the owner of the vehicle or vehicles for which he desires a license.

Section 5. Before a license shall be issued to any person to keep or use for hire any vehicle, he shall execute a bond to said city in the sum of \$500, with sureties to be approved by the mayor, conditioned for the faithful observance of all ordinances of the city relating to vehicles, and that he will promptly deliver all property intrusted to him to the persons entitled thereto.

Section 6. Charges for the transportation of persons and property by all persons licensed hereunder shall be as follows, viz:

First. For carrying each passenger between any two points within the city, twenty-five cents.

Second. For the use of any two-horse cab, carriage or other vehicle, with driver, by the hour, the sum of \$1 per hour.

Third. For the use of any one-horse vehicle, by the hour, with driver, fifty cents per hour.

Fourth. For carrying merchandise or property of any kind upon a wagon, truck or dray, for any distance not exceeding six blocks, the sum of twenty-five cents per load; for any distance exceeding six blocks, fifty cents per load.

Section 7. Any person licensed under this chapter, or the driver of any such licensed vehicle, who shall charge, or cause to be charged, any greater sum than the rates provided in section six of this chapter, for carrying any passenger or property, shall be fined not less than \$5, nor more than \$100 for each offense, and the owner of such vehicle

shall in addition thereto forfeit his license for the same, in the discretion of the mayor.

Section 8. No driver of any coach, cab, dray or other vehicle licensed under this chapter, shall, at any depot, or at any stand waiting for employment or other place, leave his team, 'bus, carriage or vehicle to solicit passengers, or shall conduct himself in a boisterous or disorderly manner, or use any indecent or profane language, or in any way vex or annoy any traveler, passenger or other person, or unnecessarily snap or flourish his whip, or obstruct any street or sidewalk in said city, under a penalty of not less than \$3, nor more than \$100.

Section 9. The city marshal shall designate stands for all cabs, coaches, omnibuses, or other vehicles at all railroad depots, where the same shall stand while waiting for passengers or property; and shall also designate and fix the stands at other points in the city where all drays, carts, coaches, cabs or other licensed vehicles shall stand while waiting for passengers or employment; and said city marshal shall make all necessary rules and regulations for the use and occupation of said stands by such licensed vehicles. Provided, that no such stand shall be assigned for any such vehicles in front of any premises, against the wish of any owner or occupant of the same. Any owner or driver of any such licensed vehicle, who shall cause, or permit the same to stand or remain at any place, waiting for passengers or employment, other than the one assigned for the same, or shall violate any of the rules of the city marshal regulating such stands as aforesaid, shall be fined not less than \$3, nor more than \$50 for each offense.

Section 10. The city marshal and the several police officers of the city shall have power to order the driver or other person having charge of any licensed vehicle, to remove such vehicle away from any place in any of the streets, which in his or their opinion may be improperly incumbering such street, or obstructing or impeding public travel; and any person refusing or neglecting to comply with such order shall be fined not less than \$2, nor more than \$20.

Section 11. Any owner or driver of any cab, coach or other licensed vehicle, who shall induce anybody to employ him, by knowingly or wantonly misinforming or misleading such person, either as to the time or place of the arrival or departure of any railroad train, or the distance to, or location of any depot, office, station, hotel, public place or private residence within said city, or shall be guilty of any

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other fraud, extortion, or attempted fraud or extortion, upon such person, shall be fined not less than \$5, nor more than \$100 for any or either of the aforesaid offenses.

Section 12. The driver of every licensed vehicle shall keep in his possession at all times, a certified copy of section six of this chapter, or any amendments thereto hereafter passed by the city council, and shall exhibit the same to any person employing him, who shall demand the same, under a penalty of not less than \$3.'

On May 1, 1901, the city of Danville had issued a license to one John Noone, proprietor of a 'bus line, for each of the several vehicles owned by him, and had also issued a license to Green & Company, proprietors of another 'bus line, for each of the several vehicles owned by them, the said Green & Company making all trains on regular schedule time. Both of these licenses are of the same date and of the same terms. Thomas Noone, the defendant, was a driver in the employ of John Noone. At the depot of the 'Big Four Railroad' in the city of Danville, the principal street runs north and south, the railroad runs east and west. The depot platform is on the north side of said railroad tracks and on the west side of said street. This platform is some twenty-five or thirty feet wide, and just north of the east end thereof is a long space of public ground at which vehicles may stand while awaiting the arrival of passengers. The trains of the 'Big Four Railroad' stop west of said Vermilion street, and therefore passengers who alight upon the platform from incoming trains proceed along the platform in an easterly direction toward Vermilion street, that is to say, the great majority of them do. In so doing, such passengers necessarily reach the west end of the said space devoted to 'buses, etc., first. Some time prior to the arrest of the defendant, the chief of police, William Wandrick, purporting to act under authority of the ordinance aforesaid, had given to the 'buses and cabs of Green & Company, the first two western places, to be reserved for them at all trains; and to the hacks and cabs of Noone, the third space counting from the west; that is, the vehicles of Green & Company were allowed to take the first two places along this platform farthest west, or what is known as the first and second places at which passengers arrive. Each of these 'bus line proprietors and drivers had been notified of this assignment by the chief of police. On the day in question, Thomas Noone, the defendant, driving one of the cabs of John Noone, went to the Big Four depot and found a cab of Green & Company in the first or extreme

western place; he then drove into the second place. The policeman on duty directed him to drive out of said place and give the same to one of Green & Company's cabs which arrived later. This the defendant declined to do, and was accordingly arrested. The complaint made against him is as follows:

'THOMAS NOONE TO THE CITY OF DANVILLE, DR.

To fifty dollars for violation of section No. 9 of chapter No. 41 of the Revised Ordinances of said city of Danville, entitled "Vehicles," passed and approved on the 30th day of April, A. D. 1892, in this, to wit:

That the said Thomas Noone on or about the 24th day of May, A. D. 1901, before the commencement of this suit, at Danville, and within the corporate limits of the same, unlawfully did then and there cause and permit a cab, licensed under and by virtue of the ordinances of the said city of Danville, to stand and remain at the city depot of the C., C., C. & St. L. R. R. Co., in said city of Danville, waiting for passengers and employment, at a place other than the one assigned for the said cab by the chief of police (formerly called city marshal) of the said city of Danville, and did then and there violate the rules of the said chief of police (formerly called city marshal) regulating the stands for such vehicles aforesaid, the said Thomas Noone being then and there the driver of the said cab, contrary to the provisions of the ordinances of the said city of Danville.

J. H. LEWMAN,
City Attorney.'

The defendant committed no other offense, except to drive into the space which the chief of police had allotted to the cabs and vehicles of said Green & Company, to be reserved for the vehicles of said company at all times."

The only important question raised or discussed in this case is whether the ninth section of the ordinance should be construed as authorizing the chief of police of the city to designate certain stands at the "Big Four" depot in that city, which were more conveniently located for receiving and discharging persons and property there, to be used exclusively by the licensed vehicles of Green & Company, and require the licensed vehicles of other persons to occupy at that depot, other stands which were less conveniently located for the same purpose, irrespective of whether the vehicles of the one or the other arrived first.

It is conceded on both sides that the city possessed the power, under the statute, to license, tax and regulate hackmen, draymen, omnibus drivers and others pursuing like occupations, but it is argued for the city that by the terms of the ninth section of the ordinance, the chief of police properly designated which stands at the depot vehicles of Green & Company could occupy, and which stands there those of John Noone could occupy, and that neither could occupy the stands designated for the vehicles of the other without incurring the penalty prescribed by the ordinance, regardless of whether the vehicles of the one or the other arrived at the depot first.

Counsel for appellee, Thomas Noone, contend that inasmuch as the stands which were designated for the exclusive use of the vehicles of Green & Company were more conveniently located for receiving and discharging persons and property than those designated for John Noone, the manner of regulating the business which the city had licensed both to carry on, was unreasonable and oppressive to John Noone, as well as being calculated to create a monopoly thereof in favor of Green & Company, which was not authorized by that section, and even if it was, it would be void for that reason.

We are of opinion that the position taken by counsel for appellee is the proper one; for when privileges are granted by an ordinance of a city, they must be open to the enjoyment of all persons similarly situated upon equal terms and conditions; and an ordinance framed so as to grant such privileges to some and refuse them on equal terms to others would be invalid for being unreasonable, oppressive, and creating a monopoly. *City of Chicago v. Rumpff*, 45 Ill. 90; *Tugman v. City of Chicago*, 78 Ill. 405, and *City of Chicago v. Trotter*, 136 Ill. 430.

To construe the ordinance so that it authorized the city marshal to designate more favorable stands for the vehicles of Green & Company at the depots, than those designated for the vehicles of others, would render it invalid for providing an unreasonable and oppressive manner of exercising

the power to regulate the business, and would create a monopoly.

The learned judge who tried this case in the Circuit Court therefore correctly held the ordinance did not confer such authority upon the chief of police, and the judgment will be affirmed.

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Henry Dauel et al. v. John P. Arnold, Adm'r.

1. PRACTICE—*Where Oral Evidence is Not Preserved.*—Testator wishing to avoid the expense and delay of an administration of his estate, made deeds of his property to his children, with directions that they be delivered upon his death. By his will he charged each devise with its proportionate share of the debts owed by the estate. After the death of the testator and after his will was admitted to probate, one of the devisees sold part of his land to plaintiffs, who insist that the share of indebtedness to be borne by their land is excessive. *Held*, that as the oral evidence which the court heard was not preserved and is not in the record, so that this court can see what was before the trial court, it must be presumed that there was sufficient evidence to warrant the court in making the decree it did.

Petition to Sell Land to Pay Debts.—Error to the County Court of McLean County; the Hon. R. A. RUSSELL, Judge presiding. Heard in this court at the November term, 1901. Affirmed. Opinion filed June 20, 1902.

JOHN G. BOEKER, E. BROCK, J. J. THOMPSON and J. E. POLLOCK, attorneys for plaintiffs in error.

CHARLES L. CAPEN and JAMES P. GROVE, attorneys for defendant in error.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

This was a petition filed by Ruth Ann Bunn, executrix of the last will and testament of Isaac K. Bunn, deceased, in the County Court of McLean County, against Minor K. Bunn, John L. Bunn, Frank M. Bunn, Louie Hetland and L. S. Hetland, her husband, Hugh W. Bunn, Abraham Bunn, Jeremiah I. Bunn, Mary Paxton and John Paxton,

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her husband, and Eva J. Cline, and S. E. Cline, her husband, for an order of that court authorizing and empowering the petitioner to sell the real estate of said deceased to pay his debts.

After the petition was filed, the petitioner, Ruth Ann Bunn, by leave of court, resigned as such executrix, and John P. Arnold was appointed, and qualified as the administrator *de bonis non* with the will annexed of the estate of said Isaac K. Bunn, deceased, and by leave of court, he was substituted for her as petitioner, and the petition was amended so as to read as follows :

“Your petitioner respectfully represents that heretofore, to wit, on or about the twenty-first day of November, A. D. 1897, the said Isaac K. Bunn, then of said county, departed this life testate, leaving him surviving his widow, Ruth Ann Bunn, and Minor K. Bunn, John L. Bunn, Frank M. Bunn, Louie (or Nefa) Hetland, (whose husband's name is L. S. Hetland,) Hugh W. Bunn, Abraham Bunn, Jeremiah I. Bunn, Mary Paxton, (whose husband's name is John Paxton,) and Eva J. Cline, (whose husband's name is S. E. Cline,) his sole children and heirs at law; each of which said children except said Jeremiah I. Bunn is a devisee under the last will and testament of said Isaac K. Bunn, as is hereinafter set forth; and the said Ruth Ann Bunn is a legatee under said last will and testament, as is hereinafter set forth.

Your petitioner further shows that the said Isaac K. Bunn died seized of certain lands situate in the county of McLean aforesaid, known and described as follows, to wit: the east half of the northwest quarter of section twenty; the north half of the west half of the southwest quarter of section twenty; the south half of the west half of the southwest quarter of section twenty; the west half of the northeast quarter of section twenty; the east half of the northeast quarter of section twenty-one; the west half of the northeast quarter of section twenty-one; the west half of the northwest quarter of section twenty (20) and the east half of the southwest quarter of section twenty (20). All of said lands lying and being in township twenty-four north, range five, east of the third P. M. Said testate was not seized of any lands other than those above specified at the time of his decease.

Your petitioner further shows that at the time of his

decease the said testator was the owner of and was possessed of sixty-three shares of the capital stock of the bank of Colfax, in said county of McLean. Your petitioner shows that of said lands a certain part, as hereinafter stated, were incumbered at the time of the decease of said Isaac K. Bunn by a certain mortgage executed by himself and wife to one Abraham Brokaw for the principal sum of \$5,728 with interest thereon, which said interest is somewhat in arrears, as is hereinafter stated, but the entire amount of said principal of said mortgage indebtedness except \$728 of the principal heretofore paid thereon, remains and is wholly unpaid.

Your petitioner further shows that prior to his decease, the said Isaac K. Bunn, joined by his wife, said Ruth Ann Bunn, prepared, signed, sealed and acknowledged certain deeds to his children, respectively (except to said Jeremiah I. Bunn), as follows:

To said John L. Bunn, the said east half of the northwest quarter of section twenty;

To said Mary Paxton, the said east half of the southwest quarter of section twenty;

To said Eva J. Cline, under her then maiden name of Bunn, the said north half of the west half of the southwest quarter of section twenty;

To said Minor K. Bunn (under the name of M. K. Bunn) the said south half of the west half of the southwest quarter of section twenty;

To said Abraham Bunn (under the name of Abe Bunn) the said west half of the northeast quarter of said section twenty;

To Frank M. Bunn, the said east half of the northeast quarter of section twenty-one;

To said Ruth Ann Bunn, for the term of her natural life, the said west half of the northeast quarter of section twenty-one, with remainder at her death to said Hugh W. Bunn in fee simple;

To said Ruth Ann Bunn, the said west half of the northwest quarter of said section twenty (20) for the term of her natural life, with remainder at her death to said Mrs. Louie (or Neva) Hetland in fee simple, which said life estates were so provided in consideration of the release and waiver by her, said Ruth Ann Bunn, of her dower and homestead rights in and by said respective deeds, and not by way of gift or devise.

Your petitioner further shows that no one of said deeds of conveyance was executed by delivery during the lifetime

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of said Isaac K. Bunn, but remained and continued in the possession, custody and control of him, said Isaac K. Bunn, up to and at the time of his decease, as hereinafter more fully stated and set forth.

Your petitioner further shows that thereafter, to wit, upon the fourth day of January, A. D. 1898, the last will and testament of the said Isaac K. Bunn was duly admitted to probate in your honor's said court, and still remains and is in full force and effect; and that on, to wit, the day and year last aforesaid, the said Ruth Ann Bunn was duly appointed by your honor's court the executrix of said last will and testament.

Your petitioner further shows that in and by said last will and testament it was, among other things, provided, that said deeds of conveyance should be delivered to said grantees therein named respectively, after the decease of the said testator; that said life estates to said Ruth Ann Bunn were in payment and in consideration of her release of dower and homestead in the deeds aforesaid other than those in which she is one of the grantees as aforesaid. Your petitioner further shows that in and by said last will and testament, the said Ruth Ann Bunn is given and bequeathed sixty-three shares of the capital stock in the State Bank of Colfax of the par value of \$100 each, which said shares of stock were worth their par or face value.

Your petitioner further shows that at the time of his decease, and at the time of the execution of said last will and testament, said testator supposed her personal estate, other than said bank stock, would pay all his indebtedness except the mortgage indebtedness, aforesaid; that at said time and times, some of his children owed him, and to some he was indebted; that as shown by last will and testament, the said testator intended to and did settle all said accounts between himself and each of his said children, and estimated, after and including such settlement, that each of his said children who were devisees, would receive by way of gift and devise the sum of \$6,000. Said last will and testament provides the said mortgage indebtedness should be paid by said devisees of real estate *pro rata*.

But your petitioner shows that said testator had heretofore become security on a large amount of indebtedness shown by certain promissory notes, which said indebtedness has been proved up against said estate, and judgments rendered against said estate therefor, as is hereinafter more fully and at large set forth.

Your petitioner further shows that shortly after the

decease of said testator, the said deeds of conveyance were delivered to the respective grantees named therein, and were each duly recorded in the recorder's office of the said county of McLean and still remain and are of record.

Your petitioner further shows that the security debts aforesaid were contracted, all of them, for certain of the children of said testator as hereinafter set forth, and should, each and all of them, be charged against the lands of said children who are principals upon said promissory notes and indebtedness, so far as such lands devised, as aforesaid, are of value sufficient to pay the same.

Your petitioner further shows that each said principal debtors respectively have no property or estate with which to pay said respective indebtedness, except the lands so devised to them respectively as aforesaid.

Your petitioner further shows that said testator was also mistaken as to the amount of indebtedness upon certain of the lands so devised and as to certain back interest remaining unpaid upon certain others of the lands by him devised as aforesaid.

Your petitioner further shows that it is evident said testator believed his estate would not be called upon to pay any of said security debts, but that they and each of them would be paid by the respective principal debtors.

Your petitioner further shows that he is advised by counsel and verily believes and upon such advice and belief states the fact to be that the legal effect of said last will and testament is that all the indebtedness now remaining unpaid should be paid from the proceeds of said real estate devised to the respective legatees, and that the bequest to said Ruth Ann Bunn of personalty, should not be required to contribute thereto, and that each and all of the said devisees, except said Minor K. Bunn and his grantees as hereinafter stated, are desirous that this be done, and that said Ruth Ann Bunn be wholly relieved of contributing at all thereto.

Your petitioner further shows that thereafter, to wit, on the 10th day of September, 1898, the said devisees other than Minor K. Bunn, desirous of paying all the claims against the estate of said Isaac K. Bunn, and of preventing the delay and expense of any proceeding to sell real estate to pay indebtedness of said estate, made an amicable arrangement and agreement in writing to accomplish that result, at a meeting held by them for that purpose. They then estimated the amount sufficient to be raised by them over and above the mortgage indebtedness at \$10,000.

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Your petitioner shows that, as he is informed and believes and upon such information and belief states the fact to be, that said Minor K. Bunn was invited to join in said meeting and to partake in said proceeding, but wholly failed and refused so to do; but those who were present agreed among themselves what the just proportionate share of each of said devisees to pay upon said basis of \$10,000 was, including said Minor K. Bunn, and they agreed each should pay, respectively, John L. Bunn, \$455; Mary A. Paxton, \$2,005; Louie Hetland, \$55; Abraham Bunn, \$2,270; Frank M. Bunn, \$1,970; Hugh W. Bunn, \$2,589; and said Eva Cline was to receive from the estate the sum of \$227.

They also stated the amount to be paid by said Minor K. Bunn upon the above basis to be \$1,405.

And your petitioner avers that each and all of said agreeing parties except said Minor K. Bunn, have at all times been and now are ready and willing to pay his or her full proportion of whatever is necessary to be paid to relieve the said estate and their respective lands from all indebtedness, but have been and still are, except as hereinafter stated, unable to raise his and her said proportion, by reason of the unsettled condition of said estate, and also by reason of the refusal of said Minor K. Bunn as aforesaid.

And your petitioner avers that upon the said basis of \$10,000 indebtedness, the just and lawful proportion to be paid by said Minor K. Bunn and to be raised by sale of the lands to him devised as aforesaid, is the said sum of \$1,405.

Your petitioner further shows that in and by said agreement, each of the parties thereto agreed to pay upon said respective sums interest from and after said tenth day of September, A. D. 1898, at the rate of six per cent per annum; and that upon the payment of said respective sums, each of said devisees would be placed upon an exact equality as regards each other, and that any further sum necessary to be raised to clear said estate from all indebtedness, should be paid by said devisees or realized from the sale of their respective lands devised to them as aforesaid *pro rata*.

All of which by said agreement, ready to be produced as your honor shall direct, will more fully and at large appear. Your petitioner files herewith a copy thereof marked 'Exhibit C,' and prays the same may be had and taken as part and parcel of this amended petition.

Your petitioner further shows that, in compliance with their said agreement, the following named of said parties thereto have hitherto and soon after the making of said

agreement, paid to said executrix of the respective amounts by them agreed to be paid, and that the same are duly credited and sworn to them by report of said executrix heretofore made and have been heretofore devoted toward the payment of the indebtedness of said estate, to wit:

The said Mary A. Paxton has so paid the sum of \$1,000; the said Abraham Bunn has so paid the sum in full he so agreed to pay, to wit, \$2,270; the said Louie Hetland has so paid the sum in full she so agreed to pay, to wit, the sum of \$55; and the said John L. Bunn has so paid the sum in full he so agreed to pay, to wit, the sum of \$455; all of which appears more fully by said report and the copy thereof heretofore filed herein, marked 'Exhibit B,' reference whereto is hereby made for greater certainty.

And your petitioner further shows that the said Ruth Ann Bunn duly qualified and entered upon her duties as executrix of the estate of said Isaac K. Bunn, deceased, and continued to act until, to wit, the twentieth day of September, A. D. 1900, when, upon her resignation of her said trust, your petitioner was duly appointed administrator of the said estate with the will annexed, and now is such administrator. Your petitioner shows the final report of said executrix, as modified by this court, which said report shows that she has exhausted the personalty of said estate, and that there is due her as such executrix the sum of \$2,574.63.

Your petitioner further shows that over and above all debts that have been paid, there have been reduced to judgment against said estate, certain claims which, together with the said indebtedness to said Ruth Ann Bunn, aggregate the sum of \$11,999.70, a schedule whereof showing the names of the respective judgment creditors, the amounts and dates of each judgment respectively, is attached hereto marked 'Exhibit D.' Your petitioner begs leave to refer thereto for greater certainty.* The amount last aforesaid does not include any interest on said judgment or any of them, but said interest up to the day of payment at the legal rate of five per cent must be added thereto, which said interest to May 15, 1901, amounts to about \$786.09.

* By leave of court petitioner amends this petition on the face as follows, by inserting at the * on this page the following words: 'Your petitioner shows that the judgment heretofore entered herein in favor of Ruth Ann Bunn is excessive to the extent of \$360 and should be reduced to

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that extent, which reduction is agreed to by the said Ruth Ann Bunn.'

Your petitioner estimates the amount necessary to be further added for the costs of this proceeding, the costs of administration of said estate and all other expenditures at the sum of \$600.

Your petitioner therefore shows to the court that there is no personal estate of said estate remaining to pay the said indebtedness, costs or expenses, or any part thereof; that no personal estate has come into his hands, and that he knows of none; and that your petitioner has no means of paying any of the indebtedness, interests or costs, commissions or any of the other expenses of his said trust, except by the sale of the real estate in this petition specified or so much thereof as shall be necessary therefor.

Your petitioner knows of no other claims against said estate that are now provable as against the same or any part thereof, the limitation of two years for the presentation against said estate having now expired. Your petitioner shows it will be necessary to sell sufficient of said real estate to raise money to pay off all indebtedness, costs and charges as hereinbefore and hereinafter stated and set forth. Your petitioner further shows that there are no further assets within his knowledge that are collectible, and that Jeremiah I. Bunn is wholly insolvent and no more can be collected from him than has been collected by said executrix as shown by her report, and your petitioner verily believes and upon such belief states the fact to be, no further sum is collectible from any of the indebtedness due said estate.

* Your petitioner further shows that of the foregoing unpaid indebtedness as hereinbefore stated, as your petitioner is informed, the entire judgment of date July 17, 1899, for the sum of \$1,896.23 in favor of the estate of Thomas Kennedy is for the debt of Hugh W. Bunn as principal debtor and for which said Isaac K. Bunn was surety only, and that in adjusting the equities relative thereto between the parties in interest, the whole amount of said judgment and all interest thereon to time of payment should be charged against the lands devised to said Hugh W. Bunn. Your petitioner, however, states said Hugh W. Bunn claims he is properly chargeable with but \$1,070 of interest thereon from the date of rendition of said judgment, and that the residue thereof should be paid out by the said estate. Your petitioner has no personal knowledge relative to said con-

tention, but respectfully submits said contentions to this honorable court for its decision and determination if said Hugh W. Bunn so desires. *

Your petitioner by leave of court amends this petition as follows: By striking out the paragraph between the * * on this page and inserting in lieu thereof the following words: 'Your petitioner shows that said Hugh W. Bunn is primarily liable for that part of the said Thomas Kennedy estate judgment that is represented by the one thousand dollar promissory note to said Thomas Kennedy, together with all interest accrued thereon both prior to and subsequent.'

Your petitioner further shows the said judgment against said estate in favor of the bank of J. W. Arnold & Co., of date April 25, 1900, for the sum of nine hundred and fifteen and fifty-eight hundredths (\$915.58) dollars, was rendered upon a certain promissory note given by said Hugh W. Bunn as principal, and said Isaac K. Bunn as security, and that the entire amount thereof with interest from the date of its rendition should be paid by said Hugh W. Bunn. This amount with interest to May 15, 1901, is nine hundred and sixty-three and ninety hundredths (\$963.90) dollars.

Your petitioner further shows that a certain mortgage was executed by the said Isaac K. Bunn in his lifetime, and his wife, to said Abraham Brokaw, which said mortgage last aforesaid is a first lien upon the west half of the southwest quarter of said section twenty (20).

Your petitioner further shows that in addition to said mortgage to Abraham Brokaw the said Isaac K. Bunn, in his lifetime, executed his certain other mortgages as follows:

On, to wit, the first day of January, A. D. 1894, the said Isaac K. Bunn, joined by his wife, said Ruth Ann Bunn, executed his certain mortgage to one Henry Capen upon the said west half of the northeast quarter of section twenty, for the principal sum of \$2,000, which said mortgage, by extension, falls due on the first day of January, A. D. 1904, and bears interest at the rate of five per cent per annum. Said mortgage is duly recorded in book 125 of the mortgage records of said county at page 69.

On, to wit, the second day of March, A. D. 1896, the said Isaac K. Bunn, joined by his wife, said Ruth Ann Bunn, executed their certain other mortgage to said Henry Capen for the principal sum of \$2,500, which mortgage last aforesaid is upon the said east half of the southwest quarter of said section twenty (20) and falls due upon the first day of

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March, A. D. 1901. The mortgage last aforesaid is duly recorded in book 125 of the mortgage records of said county at page 102; and

On, to wit, the said second day of March, A. D. 1896, the said Isaac K. Bunn, joined by his wife, Ruth Ann Bunn, executed their certain other mortgage to said Henry Capen, which said mortgage last aforesaid is upon the said northwest quarter of said section twenty, is for the principal sum of \$6,000, falls due on the first day of March, A. D. 1901, and bears interest at the rate of six per cent per annum.

Your petitioner last aforesaid shows that the mortgage last aforesaid is duly recorded in book 125 of the mortgage records of said county at page 101.

Your petitioner further shows that the said mortgage to Abraham Brokaw is dated January 6, A. D. 1892, is for the principal sum of \$5,728, and is upon the said northeast quarter of said section twenty-one, of which principal amount the sum of \$728 has been paid heretofore, and is recorded in the mortgage records of said county of McLean in book 136 of mortgages at page 125.

Your petitioner further shows that no part of the principal sum of any of the aforesaid mortgages has been paid, as your petitioner is informed and believes; but that all interest that has accrued and become due on each of the said Capen mortgages has been fully paid, as your petitioner is informed and believes, but that there will be due in all on the said Brokaw mortgages on April 3, 1901, the sum of \$7,049.43.

Your petitioner further shows he is advised by counsel and believes, and from such belief shows the fact to be, that under the agreement aforesaid, the ones executing it, who have paid money thereunder, and also the said Eva J. Cline, to whom the said estate owed money as aforesaid, should equitably have reasonable interest thereon from the respective times of such payments respectively; which your petitioner avers is approximately ten per cent in all, or an average of five per cent per annum.

Your petitioner therefore avers the respective lands of the said estate, conveyed as aforesaid, should pay the indebtedness aforesaid in the following proportions, and a first or prior lien therefor, as between the paid legatees, their heirs, assigns and grantees, be declared by the court as follows:

1. The said east half of the northwest quarter of said section twenty (20) devised as aforesaid to said John L.

Bunn, for five hundred and fifty-seven and thirty-five hundredths (\$557.35) dollars.

2. The said east half of the southwest quarter of said section twenty (20) devised to said Mary Paxton as aforesaid, for one thousand five hundred and seven and eighty-five hundredths (\$1,507.85) dollars.

3. The said north half of the west half of the southwest quarter of said section twenty (20) devised as aforesaid to said Eva J. Cline, for three hundred and fifty-three and fifteen hundredths (\$353.15) dollars.

4. The said south half of the west half of the southwest quarter of said section twenty (20) devised as aforesaid to the said Minor K. Bunn, for two thousand and seven and eighty-five hundredths (\$2,007.85) dollars.

5. The said west half of the northeast quarter of said section twenty (20) devised as aforesaid to said Abraham Bunn, for three hundred and seventy-five and eighty-five hundredths (\$375.85) dollars.

6. The said east half of the northeast quarter of said section twenty-one, devised as aforesaid to said Frank M. Bunn, for the sum of two thousand five hundred and twenty-two and eighty-five hundredths (\$2,522.85) dollars.

7. The said west half of the northeast quarter of said section twenty-one (21) devised subject to said life estate to said Hugh W. Bunn, for the sum of five thousand four hundred and sixty-three and fifty-nine hundredths (\$5,463.59) dollars.

8. The said west half of the northwest quarter of said section twenty (20) devised as aforesaid to said Ruth Ann Bunn for the term of her natural life, with remainder at her death to said Louie Hetland, for the sum of five hundred and ninety-seven and thirty-five hundredths (\$597.35) dollars.

Or, in the event your honor should hold that Ruth Ann Bunn's estate, other than the said life estates, should pay a full equal share with each of the other legatees of the said sum to be raised as aforesaid, then the amounts against each of the said devisees to be raised to pay the said sum of thirteen thousand three hundred and eighty-five and eighty hundredths (\$13,385.80) dollars as follows:

1. The said Ruth Ann Bunn should pay the sum of sixteen hundred and ninety-nine and forty-two hundredths (\$1,699.42) dollars, to be credited to and deducted from the indebtedness owing to her as aforesaid.

2. The said east half of the northwest quarter of section

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twenty (20) three hundred and forty-four and ninety-two hundredths (\$344.92) dollars.

3. The said east half of the southwest quarter of said section twenty (20) one thousand two hundred and ninety-five and forty-two hundredths (\$1,295.42) dollars.

4. The said north half of the west half of the southwest quarter of section twenty (20) one hundred and forty and seventy-two hundredths (\$140.72) dollars.

5. The said south half of the west half of the southwest quarter of section twenty (20) one thousand seven hundred and ninety-five and forty-seven hundredths (\$1,795.47) dollars.

6. The said west half of the northeast quarter of section twenty (20) one hundred and sixty-three and forty-two hundredths (\$163.42) dollars.

7. The said east half of the northeast quarter of section twenty-one (21) two thousand three hundred ten and forty-two hundredths (\$2,310.42) dollars.

8. The said west half of the northeast quarter of section twenty-one (21) subject to the life estate of Ruth Ann Bunn aforesaid, five thousand two hundred fifty-one and sixteen hundredths (\$5,251.16) dollars.

9. The said west half of the northwest quarter of section twenty (20) subject to the life estate of Ruth Ann Bunn aforesaid, the sum of three hundred eighty-four and ninety-two hundredths (\$384.92) dollars.

Your petitioner further shows he is advised by counsel and verily believes, and from such belief avers the fact to be, that the sale or sales hereinafter prayed for should be made strictly subject to all mortgage rights aforesaid, and that each and all of the said mortgages and all rights thereunder, should be protected and remain intact and unaffected by any order of sale or sales under this petition, and that the said life estates, and each of them, of the said Ruth Ann Bunn, be in like manner so protected and remain intact and unaffected.

Your petitioner further shows that besides the persons above named, he is informed August Boeker, Henry Dauel, Joseph Ingram, Frances F. Ingram and Henry W. Langstaff have, or claim to have, some interest or interests in the said real estate or in some part thereof, the exact nature or natures whereof is unknown to your petitioner; but which interest or interests, if any, is and are wholly subject, inferior and junior to the rights of your petitioner in and to said real estate and all of it, as hereinbefore set forth.

Your petitioner, therefore, invokes the aid of this honor-

able court and makes the said Minor K. Bunn, Emma Bunn, John L. Bunn, Ruth Ann Bunn, Docia Bunn, Frank M. Bunn, Louie Hetland, L. S. Hetland, Hugh W. Bunn, Nellie Bunn, Abraham Bunn, Mary Bunn, J. I. Bunn, Matilda Bunn, Mary Paxton, John Paxton, Eva Cline, S. E. Cline, Abraham Brokaw, August Boeker, Henry Dauel, Joseph Ingram, Frances M. Ingram, Henry W. Langstaff, Henry Capen, and H. Ochiltree (each of whom your petitioner shows is now before the court in this proceeding) parties defendant to this amended petition, and that each of said defendants be ruled and required to answer this amended petition (but not under oath, the said oath and oaths being hereby waived), and that upon a final hearing hereof, this honorable court will adjust all the rights and equities of the parties hereto, and determine what of said lands shall first be sold to raise money to pay indebtedness, costs, commissions, attorneys' fees, and all other expenses appertaining to the closing up of said estate and the payment of all claims of every kind against it; that an account be had and taken by the court of the sum of money required to be raised for the payment of all claims against said estate, including all necessary and proper expenses of every kind; that said amount be apportioned between the said tracts of land respectively, upon one or the other of the bases aforesaid, and a decree or judgment be entered herein authorizing and directing your petitioner to sell each of said tracts of land, or so much thereof as shall be necessary to raise the amounts respectively against them as aforesaid, providing, however, that if any interested person or persons shall pay to your petitioner prior to said sale, the amount or amounts so found equitable and just for any of the said tracts of land to pay, such tract or tracts shall not, in the first instance, be offered for sale. And in case such several tracts of land when so offered for sale separately, shall not bring enough to pay the proportion of the indebtedness of said estate so adjudged against it, so that not sufficient in the aggregate be raised by such several sales to pay the entire sum found necessary to be raised under the decree or judgment to be entered herein, then the whole of said lands, or such part thereof as shall be necessary therefor, shall be ordered by the court in and by its decretal order herein, sold by your petitioner to raise the revenue or the entire amount of said sum. And your petitioner prays for all such other and general relief as under the statute, and the circumstances of the case, shall be required.

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EXHIBIT 'C.'

We, the undersigned, hereby agree upon a settlement of the estate of I. K. Bunn, deceased, as follows :

First. Mrs. Ruth Ann Bunn, of course, holds absolutely in her own right, and free from any liability for debts of the estate, the property devised to her by the will of her husband, Isaac K. Bunn, in lieu of dower and homestead.

Second. Each heir, of course, assumes and agrees to pay, each for himself and herself, the incumbrance on each one's land respectively, provided, however, that in the lands devised to Mrs. Louie Hetland and Hugh W. Bunn, respectively, wherein Mrs. Ruth Ann Bunn has a life estate, the said Ruth Ann Bunn assumes and agrees to pay out of the rentals of said lands, interest, taxes and other assessments; and whatever the said Ruth Ann Bunn receives and retains from each of those lands respectively, over and above such interest, taxes, etc., so paid by her, she should, as suggested in the will of I. K. Bunn, make provision out of her effects remaining; such excess so received should be paid to the said Mrs. Louie Hetland and Hugh W. Bunn, and to this an account should be kept each year, showing the rentals upon one hand, and the sum or sums so paid out upon the other, upon each of the lands aforesaid.

Third. Each of the heirs following is to pay into the estate as follows :

Mrs. Mary Paxton, two thousand and five dollars...	\$2,005
Mrs. Louie Hetland, fifty-five dollars.....	55
Abe Bunn, two thousand two hundred and seventy dollars	2,270
John Bunn, four hundred and fifty-five dollars.....	455
Frank Bunn, one thousand nine hundred and twenty dollars.....	1,920
Minor K. Bunn, one thousand four hundred and five dollars.....	1,405
Hugh W. Bunn, two thousand five hundred and eighty-nine.....	2,589
Mrs. Eva Cline is to receive from the estate two hundred and twenty-seven dollars.....	227

Each of the above sums to draw interest from September 10, 1898, at the rate of six per cent per annum.

The foregoing is an exact settlement and division upon the basis that the indebtedness of the estate, exclusive of the mortgage incumbrance, is ten thousand dollars (\$10,000). This adjustment upon this basis at this date, September 10, 1898, puts each of the heirs above named upon an equality; and should the above specified sums due the estate from

the heirs prove insufficient to discharge all indebtedness of the estate, then any further sum necessary shall be raised by said assessment of like amount upon each of the 560 acres devised in the will of I. K. Bunn, deceased, or by any other just and equitable method. Any payment or payments of \$5,500 and interest due the estate from J. I. Bunn is to be shared equally among the remaining eight heirs; and any payment or payments of \$1,405 due the estate from Minor K. Bunn, is to be shared equally among the heirs, exclusive of Minor and J. I. Bunn, provided that such payments shall be first applied upon any indebtedness of the estate existing at the time such payments are made. But the land of any heir paying his or her share of the estate's indebtedness is in no event to be liable further, on account of failure of any other of the heirs to pay their just proportion.

Signed, MRS. EVA J. CLINE,
MARY A. PAXTON,
JOHN L. BUNN,
HUGH W. BUNN.
MRS. NEVA E. HETLAND,
F. M. BUNN, per Hugh W. Bunn,
ABE M. BUNN.

EXHIBIT 'D.'

May 3, 1898, S. H. Arnold.....	\$ 394 54
May 3, 1898, Powers Bros.....	275 46
Mar. 7, 1899, N. J. Parr.....	584 09
Mar. 7, 1899, Mary E. Powell, conservator...	172 89
July 17, 1899, Estate Thomas Kennedy.....	1,896 33
July 24, 1899, H. W. Langstaff.....	172 25
Dec. 16, 1899, John L. Bunn.....	1,054 40
Dec. 12, 1898, E. Rodgers.....	107 02
Dec. 23, 1899, W. J. Quan & Co.....	358 11
April 25, 1900, J. P. Arnold, agent.....	122 48
April 25, 1900, Bank of J. W. Arnold & Co...	915 58
April 25, 1900, H. L. Barnes.....	647 21
April 25, 1900, Corn Belt Bank.....	476 53
April 25, 1900, Samuel Weeks.....	610 84
April 25, 1900, Peter Rinehart.....	242 08
April 25, 1900, W. V. Tue.....	832 40
Sept. 20, 1900, A. E. Bunn (judg't and costs)..	922 87
Sept. 20, 1900, Ruth Ann Bunn.....	2,574 63

Total principal of judgments..... \$12,359 71"

August Boeker, Henry Dauel, Joseph Ingram and

Frances Ingram, who were made defendants to the amended petition, made answer thereto as follows :

“ These defendants admit that Isaac K. Bunn departed this life testate, leaving heirs and legatees, as set up in said bill. These defendants also admit that the said Isaac K. Bunn died seized of the land mentioned in said bill, and admit that he was the owner of sixty-three shares of the capital stock of the Bank of Colfax, and aver that the said capital stock of the said Bank of Colfax was worth the par value of \$6,300 or more. These defendants admit that the said Isaac K. Bunn and Ruth Ann Bunn, his wife, prepared, signed, sealed and acknowledged the deeds mentioned in said bill, and admits that the said deeds were not delivered during the lifetime of the said Bunn. These defendants further admit that the last will and testament of the said Isaac K. Bunn was duly admitted to probate in the County Court of the said County of McLean, and that the same is in full force and effect, and admits that the said Ruth Ann Bunn was appointed by said will as executrix of the same, and avers that the said Ruth Ann Bunn, in conformity with the terms of said will, was allowed to act without giving bond, for the faithful performance of her duties as executrix. These defendants further answering say that a copy of said will and the deeds mentioned therein, is herewith filed, marked Exhibit ‘ A,’ and it is hereby made a part of this answer. These defendants further answering say that the said Ruth Ann Bunn made, executed and delivered in the manner the said deeds were delivered, a release of dower and homestead, a copy of which is herewith filed, marked Exhibit ‘ B,’ and is hereby made a part of this answer. These defendants further answering say that the said Isaac K. Bunn at the time of his decease left sufficient personal estate to pay the indebtedness of the said estate, but that Ruth Ann Bunn, the executrix, has diverted the same and appropriated a large portion, if not all, the personal estate of the said Isaac K. Bunn, deceased. These defendants further answering say that they are advised and believe that under a proper construction of the said will of the said Isaac K. Bunn, deceased, the personal property of the said decedent should have been appropriated to the payment of the debts of the said estate. These defendants further answering say that they are not advised, and neither admit nor deny the extent of the indebtedness of the said estate, as shown by said bill. That these defendants aver that a large number of the claims, if not all, that were against

said estate that were proven up by the heirs and legatees of the said Isaac K. Bunn, deceased, were obtained by collusion between the said Ruth Ann Bunn, executrix, while acting as such executrix, and the claimants. These defendants admit that the said deeds mentioned in the said bill were duly recorded, as alleged in said bill. These defendants deny that any of the said indebtedness so proved up, should be charged to the lands deeded by one of the said deeds to Minor K. Bunn. These defendants further answering say that Joseph Ingram is the husband of Frances F. Ingram, two of the defendants of said bill; that Minor K. Bunn conveyed lands in the said deeds conveyed by Isaac K. Bunn to him, to August Boeker and Henry Dauel, or to one of them, and that the said August Boeker and Henry Dauel, or one of them, conveyed the same to Frances F. Ingram, one of the defendants, and who is now the owner in fee of the said land. These defendants further answering say that they are not advised as to the agreement made between the various legatees in said will in said bill set forth, except Minor K. Bunn, and aver that said agreement could be of no binding force and effect without being concurred in by all of the legatees in said will mentioned, and one of these defendants, Frances F. Ingram, who obtained title by mesne conveyance to the land deeded by the said Isaac K. Bunn to the said Minor K. Bunn. And these defendants further answering say that Hugh W. Bunn and others of the said defendants' legatees of the said Isaac K. Bunn, deceased, are indebted to the said estate, and that it is necessary for the administrator aforesaid, to collect such indebtedness and appropriate the same to the payment of the debts of the said estate, before proceeding to sell real estate. These defendants specifically deny that said estate owes Ruth Ann Bunn anything. These defendants further answering say they are not advised as to the mortgages given by Isaac K. Bunn to Henry Capen and Abraham Brokaw, as alleged in said petition, and neither admit nor deny the same. These defendants further answering say that they deny that the various legatees paid any money in pursuance of the agreement mentioned in said bill to the executrix, but aver that if they did so, the said executrix did not appropriate same for the purpose of paying the debts of the said estate. And these defendants deny all the allegations of said bill, not herein specifically admitted or denied.

And these defendants deny all and all manner of unlawful combination and confederacy, wherewith they are by the said petition charged; without this, that if there is any

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other matter, cause or thing in the complainant's said petition contained, material or necessary for these defendants to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, it is true to the knowledge or belief of these defendants; all which matters and things these defendants are hereby willing to aver, maintain and prove, as this honorable court shall direct; and pray to be hence dismissed with their reasonable costs and charges, in this behalf most wrongfully sustained.

EXHIBIT 'A.'

I, Isaac K. Bunn, McLean county, Ill., being of sound memory and understanding, do ordain this to be my last will and testament, or in other words, a statement of my business affairs, and directions intended for those designated herein, as to the disposition of my property.

I desire my real estate to be disposed of as follows: The east half of the northwest quarter of section 20, township 24 north, range 5, east of the third P. M., to my son, John L. Bunn; the east half of the southwest quarter of same section 20 to my daughter, Mrs. Mary Paxton; and north half of the west half of same section to my daughter, Eva Jane Bunn; the south half of the west half of the southwest quarter of same section 20 to my son, M. K. Bunn; the west half of the northeast quarter of same section 20 to my son, Abe Bunn; the east half of the northeast quarter of section 21, same town and range, to my son, Frank M. Bunn; the west half of the northeast quarter of same section 21 to my wife, Mrs. Ruth Ann Bunn, for and during the term of her natural life, with remainder upon her decease to my son, Hugh W. Bunn, in fee simple; the west half of the northwest quarter of section 20, same town and range, to my wife, Mrs. Ruth Ann Bunn, for and during the term of her natural life, with remainder upon her decease to my daughter, Mrs. Louie Hetland, in fee simple; each of my sons and daughters above named to accept such lands upon condition that they assume and agree to pay, each one for himself and herself respectively, whatever mortgage, or proportionate part of mortgage may be upon his or her share.

I have executed deeds for each of the above described tracts of land as specified above, and have placed the same among my papers in my private drawer in the State Bank of Colfax; and desire and request that upon my decease, or sooner, should I so desire, said deeds be at once delivered

to the grantees therein named; said deeds to take effect upon delivery, either to the grantees or to the recorder's office for recording; and I desire and authorize my wife, Ruth Ann Bunn, upon my decease, or sooner, if requested by me, to at once procure my private papers, and the above described deeds, for the purposes above specified; retaining, of course, the three made to herself; and these presents shall be her sufficient authority to request, and for the cashier of the said State Bank of Colfax to deliver the same to her, for which delivery so made, I hereby indemnify said cashier and pledge my entire estate to insure and make good such indemnity.

Said deeds also contain certain conditions and limitations and a separate paper attached to each one showing the basis of adjustment; and whether such grantee therein named is to receive further payment from, or is indebted to my said estate, as upon reference thereto, will more fully appear.

Upon the basis of six thousand (\$6,000) dollars to each of my children, and upon full and complete settlement at this date, charging to each child for the number of, and at the price per acre, less any incumbrance thereon, in his or her deed above described, and also crediting each child not receiving land with six thousand (\$6,000) dollars in lieu thereof, there is due from me or my estate to

Frank M. Bunn.....	\$ 735 00
John L. Bunn.....	1,700 00
Mrs. Louie Hetland.....	2,100 00
Mrs. Mary Paxton.....	400 00
Eva Jane Bunn.....	2,650 00
Minor K. Bunn.....	1,250 00

There is due to me for my estate, after allowing a credit of the \$6,000 as provided, as follows:

From Jerry Bunn, \$7,000; Hugh Bunn, \$100; Abe Bunn, even; no indebtedness either way.

Full and adequate provision is also made for my wife, Mrs. Ruth Ann Bunn, in lieu of dower and homestead, by conveyances duly executed to her upon the west half of the northwest quarter of section 20, and the west half of the northeast quarter of section 21, all in township 24 north, range five, east of the third P. M., and also for lots seven and eight in block seventeen, in W. G. Anderson's first addition to the village of Colfax, the same to be delivered and take effect upon my decease unless delivered or recorded by me sooner, and for and during the term of her natural life; and my wife has also concurrently with

the execution of the above conveyance duly made and executed her relinquishment to any and all rights of dower and homestead in and to my estate, legal or equitable, present and future, except in the lands otherwise excepted as above provided; as upon reference to the said conveyances and relinquishment will more fully appear; said relinquishment to be delivered and take effect upon my decease, or concurrently with the delivery of the deeds to her above specified.

The remainder of my estate, consisting of an equitable interest in and to, commencing at the southeast corner of lot sixteen (16) in block two (2), in J. E. Wood's first addition to Woodlawn, running thence east sixteen (16) feet; thence south thirty (30) feet and nine (9) inches; thence east thirteen hundred and fifty-six (1356) feet; thence north three hundred and sixty feet and nine inches; thence west thirteen hundred and fifty-six; thence south three hundred and thirty feet. The coal underlying the above described premises is reserved by the Wood estate, and does not pass to the grantee herein named by virtue of this conveyance.

Also all my bank stock and effects in the State Bank of Colfax, valued at \$6,300, and also including the several sums due me, or which may be due from my children as heretofore specified, or which may be due me from any sources whatever, and any other property or effects, real or personal, of whatsoever kind, which I now have or may have, I devise and bequeath to my wife, Ruth Ann Bunn, to be used and enjoyed by her freely, fully, and in manner as she may desire, for and during the term of her natural life. I then direct that upon her decease there shall first be paid, of course, any just bills or indebtedness due from her estate not otherwise provided for, and that then out of whatever is remaining there shall be paid to each of my children whatever sum or sums may appear to be due each one respectively, to the end that all may be upon an equality; and that then the remainder shall be divided among all my children in equal parts, and in this, as well as in all other of my dispositions herein, should any of my children be deceased, then such part is to go to his or her heirs; and in this settlement just recompense should be made with my son Hugh W. Bunn and my daughter Mrs. Louie Hetland, for whatever years or more especially for whatever rentals from the lands deeded them, which they may fail to receive during the lifetime or occupancy of the same, by my wife, Mrs. Ruth Ann Bunn.

I desire to avoid the delay, inconvenience and expense of

administration upon my estate, and to this end I request each of my children to abide my disposition and adjustment of my estate, and to aid in the furtherance of my will and directions herein expressed without the intervention of administration. And to this further end I shall prepare and have ready not only the deeds and conveyances already referred to, but a deed for the said J. E. Wood property and a written transfer of my said bank stock, moneys and effects, and aim to deliver the same to my wife, Mrs. Ruth Ann Bunn, during my own lifetime; transferring and vesting in her absolutely the above property and effects, and authorizing and empowering her at once to accept and take possession, and use and enjoy the same forever.

All the above specified sums due from my children to me or my estate are to draw interest from date at the rate of seven per cent per annum.

Should it for any purpose become necessary to administer upon all or any part of my estate, I nominate and appoint as my executrix, and without bond, my beloved wife, Mrs. Ruth Ann Bunn.

It witness whereof, I hereunto affix my hand and seal this 30th day of January, A. D. 1897.

ISAAC K. BUNN. (SEAL)"

Exhibits to answer. Deed of Isaac K. Bunn and wife, to Minor K. Bunn, conveys the south $\frac{1}{4}$ of the west $\frac{1}{4}$ of the southwest $\frac{1}{4}$ of section 20, town 24 north, range 5 east, containing forty acres. The grantee assumes and agrees to pay an incumbrance of \$1,250.

Deed of Isaac K. Bunn and wife to Eva Jane Bunn, conveys the north $\frac{1}{4}$ of the west $\frac{1}{4}$ of the southwest $\frac{1}{4}$ of section 20. Grantee assumes \$1,250 incumbrance.

Deed of Isaac K. Bunn to Ruth Ann Bunn, certain lots near Chicago.

Deed of Isaac K. Bunn to Ruth Ann Bunn, consideration of dower and homestead, love and affection, and \$1, the west $\frac{1}{4}$ of the northeast $\frac{1}{4}$ of section 21, town 24 north, range 5 east, containing eighty acres, for and during her natural life, and remainder in Hugh Bunn. Hugh Bunn assumes and agrees to pay \$2,500.

Deed of Isaac K. Bunn and wife to Ruth Ann Bunn and Mrs. Louie Hetland. The west $\frac{1}{4}$ of the northwest $\frac{1}{4}$ of section 20, in township 24 north, range 5 east, for and dur-

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ing the term of her natural life. Upon her decease, remainder to Mrs. Louie Hetland. Grantee Mrs. Louis Hetland, assumes and agrees to pay \$2,500 mortgage.

Deed of Isaac K. Bunn and wife to Mary Paxton, the east $\frac{1}{2}$ of the southwest $\frac{1}{4}$ of section 20, subject to a mortgage of \$2,500.

Deed of Isaac K. Bunn and wife to John L. Bunn, the east $\frac{1}{2}$ of the northwest $\frac{1}{4}$ of section 20, subject to a mortgage of \$2,500.

Deed of Isaac K. Bunn and wife to Frank M. Bunn, the east $\frac{1}{2}$ of the northeast $\frac{1}{4}$ of section 21, subject to a mortgage of \$2,500.

Deed of Isaac K. Bunn, to Ruth Ann Bunn, lots 7 and 8 in block 17 in W. G. Anderson's first addition to the village of Colfax for and during the term of her natural life.

Deed of Isaac K. Bunn and wife, to Abraham Bunn, the west $\frac{1}{2}$ of the northeast $\frac{1}{4}$ of section 20, subject to a mortgage of \$2,000.

Relinquishment of dower and homestead by Ruth Ann Bunn, in consideration of 160 acres of land conveyed to her by Isaac K. Bunn, her husband.

To which answer the petitioner filed, among others, the following exceptions: (2) He excepts to the averment "that the personal property of said decedent should have been appropriated to the payment of the debts of said estate in so far as the said averment refers to the bank stock specifically devised to Ruth Ann Bunn." (4) To the averment "as to the binding force of the agreement in said petition specified as to the parties thereto or that said defendant Frances F. Ingram is a necessary or proper party thereto." (5) To the averment "that Hugh W. Bunn and the other legatees to said estate, must pay their respective indebtedness to said estate, before any order can be entered herein.

And the court sustained those exceptions.

The defendant Henry Capen answered the amended petition, setting up his rights as mortgagee more specifically than they were stated therein.

The other defendants to the amended petition made

default, and upon a hearing on the pleadings and oral evidence, the court entered a decree as follows:

“ And now this cause coming on for hearing upon the said amended petition hereon so taken as confessed as aforesaid, the answer of the defendants August Boeker, Henry Dauel, Joseph Ingram and Frances F. Ingram thereto, the exceptions and replications of said petitioner to the said answer, the said answer of said defendant Henry Capen, oral evidence heard in open court, the papers and exhibits on file in this court pertaining to said estate and the arguments of counsel, and the court being fully advised in the premises, does find that all the material allegations in said amended petition are true as therein stated and set forth, and hereby orders and adjudges that all the costs pertaining to or arising under the said answer, including the fees of all witnesses attending the court in this cause, April 3, 1901, be, and the same are hereby taxed against said defendants August Boeker, Henry Dauel, Joseph Ingram and Frances F. Ingram, and that execution issue against the defendants last aforesaid thereof.

And, more particularly, the court finds under the said amended petition, besides the above general finding, as follows:

The said Isaac K. Bunn, then a resident of the said county of McLean and State of Illinois, departed this life testate on or about the twenty-first day of November, 1897, leaving him surviving his widow, and sole children and heirs at law as set forth in said amended petition; that he died seized of the real estate specified in said amended petition; that his last will and testament has been duly probated and admitted to probate as set forth in said amended petition; and that said testate was also possessed at the time of his decease of the shares of the capital stock of the Bank of Colfax as set forth in the said amended petition, which the court finds was worth the par value thereof. The court further finds that the averments in said amended petition relative to the respective deeds of conveyance, to the several children of him, said Isaac K. Bunn, are true as stated and set forth in said amended petition, and that said deeds of conveyance respectively were executed and delivered to the said grantees therein named respectively after the death of said Isaac K. Bunn, as set forth in the said amended petition. The court further finds that the agreement made and entered into between the following ones of the children of said Isaac K. Bunn, to wit, John L. Bunn, Mary A. Paxton,

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Louie Hetland, Abraham Bunn, Frank M. Bunn, Hugh W. Bunn and Eva Cline, upon the basis therein stated is binding upon each of said parties thereto, and that under said basis, the just amount to be paid by said Minor K. Bunn is \$1,405, and that upon said basis the lands respectively devised and given to each of the said children, including said Minor K. Bunn, should primarily pay said respective amounts, together with the amounts respectively additional thereto as hereinafter set forth. The court further finds that the adjustment of accounts, as between said children, should be upon the basis aforesaid, and that the lands so devised and given as aforesaid, should be chargeable therewith.

The court further finds that, as averred in said amended petition, the following sums have been paid under and reliance upon said agreement, to wit: The said Mary Paxton has paid \$1,000; the said Abraham Bunn has paid \$2,270; the said Louie Hetland has paid the sum of \$55, and the said John L. Bunn has paid the sum of \$455. The court further finds that each and all of said payments were paid to Ruth Ann Bunn, executrix of said Isaac K. Bunn, and were by her expended in payment of certain indebtedness of said estate, other than those hereinafter specified, and that interest of, in all, ten per cent, should be allowed upon said payments respectively, in adjusting the accounts between the heirs, as hereinafter set forth. The court further finds, as shown by the reports of said executrix, said payments have all been applied upon indebtedness of said estate, as aforesaid. The court further finds said Eva Cline is entitled to an allowance of \$22.70 for interest on the amount due her under said agreement.

The court further finds that all the personal estate of the said Isaac K. Bunn, deceased, has been faithfully devoted by the said executrix to the payment of indebtedness against said estate, and other proper costs, outlays and charges, as shown by the reports of said executrix, heretofore approved by this court, and that the personal estate of the said Isaac K. Bunn, deceased, is wholly exhausted, and that no personal estate of Isaac K. Bunn, deceased, has, at any time, come into the possession of said petitioner, and that it is necessary to sell the real estate of which said Isaac K. Bunn died seized, or such part thereof as shall be necessary, to raise money to pay the indebtedness hereinafter specified, and the costs and charges still remaining unpaid. The court finds that the judgment or allowance hereinbefore

entered by this court in favor of said Ruth Ann Bunn is excessive to the extent of \$360, and should be reduced to that extent and credited therewith.

The court further finds that the following judgments against said estate are wholly unpaid. The court adds interest on said judgments respectively, from their respective dates of rendition to May 15, 1901, as follows:

1. Judgment in favor of S. H. Arnold (principal).....	\$ 394 54	
Interest on same to May 15, 1901.....	59 84	
		\$ 454 38
2. Do. Powers Bros. (principal).....	\$ 275 46	
Interest on same to May 15, 1901.....	41 78	
		\$ 317 24
3. Do. N. J. Parr (principal).....	\$ 584 09	
Interest on same to May 15, 1901.....	63 92	
		\$ 648 01
4. Do. Mary E. Powell, conservator (principal).....	\$ 172 89	
Interest on same to May 15, 1901.....	18 91	
		\$ 191 80
5. Do. Estate Thomas Kennedy (prin- cipal).....	\$1,897 33	
Interest on same to May 15, 1901.....	173 30	
		\$2,069 63
6. Do. H. W. Langstaff (principal)..	\$ 172 25	
Interest on same to May 15, 1901.....	15 55	
		\$ 187 80
7. Do. John L. Bunn (principal)....	\$1,054 40	
Interest on same to May 15, 1901.....	74 54	
		\$1,228 94
8. Do. E. Rogers (principal).....	\$ 107 02	
Interest on same to May 15, 1901.....	7 64	
		\$ 114 66
9. Do. W. J. Quan & Co. (principal).\$	358 11	
Interest to May 15, 1901.....	24 95	
		\$ 383 06
10. Judgment, J. P. Arnold, agent...\$	122 48	
Bank, J. W. Arnold & Co.....	915 58	
H. L. Barnes.....	647 21	
Corn Belt Bank.....	476 53	
Samuel Weeks.....	610 84	
Peter Rinehart.....	242 08	
W. V. True.....	832 40	
		\$3,847 12

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Interest on same to May 15, 1901.....	\$ 203 05	
		\$4,050 17
11. Judgment, A. E. Dunn (principal).\$	922 87	
Interest to May 15, 1901.....	30 12	
		\$ 952 99
12. Judgment, Ruth Ann Bunn.....	\$2,574 63	
Less as above stated.....	360 00	
		\$2,214 63
Interest on same to May 15, 1901.....	72 29	
		\$2,286 92

The court therefore finds the total indebtedness remaining unpaid, together with interest reckoned thereon as aforesaid, to May 15, 1901, is \$12,785.08.

The court further finds that of the said judgment in favor of the Thomas Kennedy estate, the sum of \$1,198.33 is upon a certain promissory note on file in this cause, for the principal sum of \$1,000, upon which said Isaac K. Bunn was surety only, and said Hugh W. Bunn the principal debtor, and that the said sum of \$1,198.33 of said judgment, together with interest thereon from the date of the rendition of the said judgment, to said 15th day of May, 1901, which said interest amounts to \$109.51, as between the petitioner and the said Hugh W. Bunn, the said Hugh W. Bunn should pay, and the land devised to him by his said father be primarily liable therefor.

The court further finds that the judgment aforesaid against said estate in favor of the bank of J. W. Arnold & Co. for nine hundred and fifteen and fifty-eight hundredths dollars (\$915.58), together with interest thereon from the date of said judgment to May 15, 1901, which said interest amounts to forty-eight and thirty-two hundredths dollars, is upon an indebtedness for which said Isaac K. Bunn was surety only, and as to which said Hugh W. Bunn was the principal debtor, and that as to the judgment and interest last aforesaid the land devised to said Hugh W. Bunn should be primarily liable.

The court further finds that no one or ones of the mortgages upon any of the tracts of land of which said Isaac K. Bunn died seized, and which were or was executed by said Isaac K. Bunn in his lifetime, should be in any way affected by this proceeding, and that no right or rights of said defendant Abraham Brokaw, or of his assignee, or of said defendant Henry Capen, should be in any manner affected, impaired or lessened by anything in this decree contained. The court further finds that the said Isaac K. Bunn intended by his last will and testament aforesaid that each of the

tracts of land respectively devised as aforesaid should bear an equal proportion of the amount necessary to be raised to pay the indebtedness of the said estate, over and above the general personal estate of which he died seized, together with the costs, outlays and charges necessary to be paid over and above the said general personal estate. The court further finds that said Ruth Ann Bunn should pay an equal proportion of the amount still remaining unpaid of the indebtedness aforesaid, the interest thereon, and of all the costs, outlays and charges yet unpaid and proper to be made.

The court estimates the amount necessary to be added to the indebtedness and interest unpaid as aforesaid for the costs of administration of said estate and all other outlays and expenditures both already incurred and hereafter to be incurred, not yet paid, to be \$600, provided the sale hereinafter ordered, be made about May 15, 1901. The court further finds that the late executrix has made just and true reports to the court of all her receipts and expenditures as such executrix, and that the petitioner has not received or paid out anything, and that the averments of the petition herein as to the mortgage liens upon the different tracts of land hereinafter specified, made by the said Isaac K. Bunn in his lifetime, are truly set forth in said petition.

The court therefore finds it is necessary for the reasons aforesaid, that the real estate of which the said Isaac K. Bunn died seized, which said real estate is described and known as follows, to wit—the east half of the northwest quarter of section twenty; the south half of the west half of the southwest quarter of section twenty; the west half of the northwest quarter of section twenty; the east half of the northeast quarter of section twenty-one (21); the west half of the northeast quarter of section twenty-one (21); the northwest quarter of the southwest quarter of section twenty (20); the west half of the northwest quarter of section twenty (20), and the east half of the southwest quarter of said section twenty (20)—all of which lands are in township twenty-four (24) north, range five (5), east of the third principal meridian, and are situated in the county of McLean and State of Illinois, or so much thereof as shall be necessary, are necessary to be sold to raise the said sum of \$13,385.80; which said sale or sales shall be made as hereinafter provided.

The court further finds that of said indebtedness the said Ruth Ann Bunn should pay the sum of \$1,699.42, which said sum should be credited upon the judgment in

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her favor aforesaid, leaving the total amount to be raised by sale of real estate, eleven thousand six hundred and eighty-six and thirty-eight hundredths (\$11,686.38) dollars; that the lands devised to said Mary Paxton, or so much thereof as shall be necessary therefor, should first be offered for sale to raise the sum of \$1,295.42; that the lands devised to said Louie (or Neva) Hetland, or so much thereof as shall be necessary therefor, shall first be offered for sale to raise the sum of \$384.92; that the lands devised to said Abraham Bunn, or so much thereof as shall be necessary therefor, shall first be offered for sale to raise the sum of \$163.42; that the lands devised to said John L. Bunn, or so much thereof as shall be necessary therefor, be first offered for sale to raise the sum of \$344.92; that the lands devised to said Frank M. Bunn, or so much thereof as shall be necessary therefor, be first offered for sale to raise the sum of \$2,310.42; that the lands devised to said Minor K. Bunn, or so much thereof as shall be necessary therefor, be first sold to raise the sum of \$1,795.42; that the lands devised to said Hugh W. Bunn, or so much thereof as shall be necessary therefor, be first sold to raise the sum of \$5,251.16; and that the lands devised to said Eva J. Cline, or so much as shall be necessary therefor, be first sold to raise the sum of \$140.72.

The court, therefore, being fully advised in the premises in accordance with the above findings, does hereby order, adjudge and decree that the said premises hereinbefore specified, or so much thereof as shall be necessary therefor, be sold by the said petitioner to raise the said sum of \$11,686.38; that of said lands, or so much thereof as shall be necessary therefor, there be first offered for sale to raise the respective amounts following, to wit:

1. The said east half of the southwest quarter of said section twenty (20), devised to said Mary Paxton, or so much thereof as shall be necessary therefor, to raise the said sum of \$1,295.42.

2. The said west half of the northwest quarter of said section twenty, or so much thereof as shall be necessary therefor, devised to said Ruth Ann Bunn for the term of her natural life, in lieu of dower and homestead rights, with remainder at her death to said Louie Hetland, to raise the sum of \$384.92.

3. The said west half of the northeast quarter of said section twenty (20), devised as aforesaid to said Abraham Bunn or as much thereof as shall be necessary therefor, to raise the sum of \$163.92.

4. The said east half of the northwest quarter of said section twenty (20), devised to said John L. Bunn, or so much thereof, as shall be necessary therefor to raise the sum of \$344.92.

5. The said east half of the northeast quarter of said section twenty-one (21), devised to said Frank M. Bunn, or so much thereof as shall be necessary therefor, to raise the sum of \$2,310.42.

6. The said south half of the west half of the southwest quarter of said section twenty (20), devised to said Minor K. Bunn, or so much thereof as shall be sufficient therefor, to raise the sum of \$1,795.42.

7. The said west half of the northeast quarter of said section twenty-one (21) devised subject to the life estate of said Ruth Ann Bunn, in lieu of her dower and homestead rights to said Hugh W. Bunn, or so much thereof as shall be necessary therefor, to raise the sum of \$5,251.16.

8. The said north half of the west half of the southwest quarter of said section twenty (20), devised as aforesaid to said Eva J. Cline, or so much thereof as shall be necessary therefor, to raise the sum \$140.72.

The court further orders, adjudges and decrees that if any one, prior to said sale, shall pay to the said petitioner, any one or ones of the sums aforesaid, above provided to be raised from any one or ones of said tracts of land, then, and in that event, the tract or tracts last aforesaid to relieve from the sale thereof such money or moneys shall be so paid, shall not be offered, in the first instance, for sale by said petitioner.

The court further orders, adjudges and decrees that in the event any one or ones of said tracts of land shall not be sold for the said sum or sums above specified as the amount for which it or they shall be, in the first instance, sold, then all of the lands of which said Isaac K. Bunn died seized, or so much thereof as shall be necessary to pay the entire indebtedness remaining unpaid of said estate, and also the estimated costs as aforesaid, to wit, the said sum of \$11,686.38 over and above the credit ordered made on the judgment in favor of said Ruth Ann Bunn as aforesaid; but in such event, the court orders and decrees that any of said tracts of land aforesaid, for which the full sum specified as aforesaid as the amount for which in the first instance it shall be sold, is offered at said sale, and purchased by a responsible bidder or bidders, shall not be again offered for sale until all the lands for which the bids equaling in amount the sum specifically charged against it or them,

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which shall not be purchased for the said sum or sums against it or them specifically devised as aforesaid shall be offered for sale.

The court further orders and decrees that the lien and rights of the holders and owners of the mortgages in the petition herein specified shall be in no manner affected by this decree, or by any sale or sales made by virtue of or by authority of this decree. The court finds that the amount due said Abraham Brokaw or his assigns under his mortgages specified in said petition, principal and interest, on the third day of April, A. D. 1901, is \$7,049.43, and that the entire principal of the notes and mortgages to Henry Capen specified in said petition and all interest accrued since the maturity of the last coupons or extension coupons heretofore due by the terms thereof, thereon remain and are wholly unpaid. The court finds all coupons or interest coupons upon said Capen notes and mortgages that are now past due, have been paid.

The court further orders and decrees, that in case, for any valid and sufficient reason, said sale can not properly be made on or before May 15, 1901, or that additional costs to the amount hereinbefore specified or now contemplated by the court shall accrue, or both, so that a greater sum shall be thus required than that in this decree provided, the sale herein decreed shall be for enough to cover all such additional sum, and in the first instance shall be added, one-ninth to each of the said several sums above specifically stated.

The court further orders and empowers said petitioner to make the sale of said lands at public sale, as, and in accordance with the terms of this decree; that in making said sale and in all his acts and doings connected therewith, he comply with all the requirements and provisions of the statute in such case made and provided; that the said sale or sales be made for cash in hand or on a credit of not less than six or more than twelve months, by taking notes, with good personal security, and a mortgage or mortgages on the premises sold, to secure the payment of the purchase money, and that on or before the first day of the term of this court next after the making by him of said sale or sales, he shall file in the office of this court a complete report of said sale or sales, as, and in accordance with the requirements and provisions of the statute in that behalf, and make full report to this court."

The defendants Boeker, Dauel, and the two Ingrams,

excepted to the entry of the decree; and they prosecute this writ of error to reverse same, and have assigned and urge the following alleged errors :

“ First. The court erred in giving an improper construction to the will.

Second. The court erred in rendering the decree.

Third. The court erred in sustaining exceptions 2, 4 and 5 to the answer of the defendants.

Fourth. The court erred in proceeding as in cases of special assessment.

Fifth. The court erred in providing in the decree for successive sales.

Sixth. The court erred in rendering any decree upon the petition filed in said cause, the same being wholly insufficient upon which to base the decree.

Seventh. The court erred in computation as to the amount coming from Minor K. Bunn.”

The defendants in error, as administrator *de bonis non*, with the will annexed of the estate of Isaac K. Bunn, deceased, petitioned the County Court for an order authorizing him to sell enough of the real estate of the deceased to pay his debts remaining unpaid after applying all of the personal property belonging to the estate which, by the will of the deceased, had not been specifically bequeathed to his widow.

The petition also set up that by his will, the deceased had devised specific portions of his real estate to his widow and nine children respectively, and charged each portion with the debts owing by the testator according to the value of the portion devised as compared with the value of all the real estate; and the prayer thereof, in addition to asking for an order to sell the real estate to pay the debts, was that the court apportion the amount of said indebtedness to the respective portions of the real estate devised to said widow and children respectively, so that each of said portions should be sold, to raise therefrom the part of said indebtedness which the value of such portion bears to the total value of all the real estate owned by the deceased at the time of his death, so that each of said portions will be called upon to raise its equitable portion of said debts.

The petition charges that all the personal property which the deceased left when he died has been applied on the indebtedness owing by the deceased, except that the widow has taken such as was given her by the terms of the will in lieu of her homestead estate and dower rights in all of said real estate.

The plaintiffs in error were made parties defendants to the petition, as was also the widow and heirs at law of the deceased.

From the answer of the plaintiffs in error to the petition it appears that the only interest they have in any matters covered by the petition is as purchasers from Minor K. Bunn, one of the devisees in the will, of the portion of said real estate which was devised to him by his father; and that such interest had been acquired after the death of the father and after his will had been admitted to probate in the County Court of McLean County.

On the hearing of the petition there was oral evidence introduced and the court found the facts stated in the petition were true, and made the special findings as stated in the decree set out in the statement preceding this opinion, and in the decree, among other things, apportioned the amount of indebtedness which that part of the real estate which plaintiffs in error purchased from Minor K. Bunn should bear at \$1,795.42.

The plaintiffs in error insist that the portion of the indebtedness allotted by the court to their land, is too much, but the oral evidence which the court heard has not been preserved and is not in the record, so that we can not see what was before the trial court, and therefore we must presume that there was sufficient evidence to warrant the court in making the decree in the way it did.

Under the pleadings in the case and the findings of the decree, we find nothing that indicates that plaintiffs in error are prejudiced in any manner by the portion of the debts which the decree apportions to the land purchased by them. They purchased the land from Minor K. Bunn, who obtained title thereto under the will and deed of his deceased father,

and at the time they so purchased, the land was, under the terms of the will and deed, burdened with the payment of its equitable portion of the debts owing by him, and the trial court, by its decree, as far as we can see from the record, has charged it accordingly, and therefore we must affirm it.

Ezra E. Staninger et al. v. Lucy May Tabor.

1. **STATUTE OF LIMITATIONS—*When it Begins to Run.***—The statute of limitations affects only the remedy and does not commence to run until the party to be barred has a right to invoke the aid of the court to enforce his remedy.

2. **STATUTES—*Section 132, Criminal Code—What Purchases of Grain for Future Delivery Come Within Meaning of.***—In order to bring purchases and sales for the future delivery of grain within the meaning of the statute, there must be a mutual intention upon the part of the seller and the buyer that the grain shall not be delivered or received. Such intention may be established, not merely by the assertions of the parties in that particular transaction, but by all the attending circumstances which may include similar transactions made with other persons at the same time and place.

3. **STATUTORY PENALTIES—*Right of Defendant to Attack Good Faith of Prosecution to Recover Money Lost at Gambling.***—In a suit brought to recover treble the amount of the losses, the defendant should be allowed to prove, if he can, that while the suit is being prosecuted in the name of a third party, it is really and truly the suit of the loser and that he and the plaintiff have conspired together for the purpose of mulcting the defendant into the heavy penalty provided by the statute.

4. **SAME—*Proof of Bad Faith of Prosecution Admissible Under the General Issue.***—Proof of bad faith of the prosecution under section 132 of the Criminal Code, such action being an action in case, is admissible under the general issue.

5. **INSTRUCTIONS—*Belief of Jury Should be Based upon Evidence.***—Instructions to the jury should direct them that their belief upon disputed questions of fact should be based upon the evidence, and any instruction which does not contain the element of a finding "from the evidence" is vicious.

6. **VENUE—*Where Action for Penalties Must be Brought.***—A suit to recover treble the amount of money lost by gambling is an action for a penalty and must be brought in the county where the gambling was done and the money lost. It is a real action and not transitory.

7. **ASSIGNMENT—*Of Funds in Bank by Check.***—Where one delivers a

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check for the payment of money out of funds which he has on deposit subject to check, it is an assignment *pro tanto*.

Trespass on the Case.—Prosecution under section 132 of the Criminal Code. Appeal from the Circuit Court of Moultrie County; the Hon. WILLIAM G. COCHRAN, Judge presiding. Heard in this court at the November term, 1901. Reversed and remanded. Opinion filed June 20, 1902.

CRAIG & KINZEL, attorneys for appellants.

JOHN R. EDEN, J. K. MARTIN and E. J. MILLER, attorneys for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

This is a suit brought by appellee to recover treble the amount of money lost by her husband, W. M. Tabor, to appellants, by gambling in futures in grain and provisions. It is based upon section 132 of the Criminal Code, which reads as follows:

“Any person who shall, at any time or sitting, by playing at cards, dice or any other game or games, or by betting on the side or hands of such as do game, or by any wager or bet upon any race, fight, pastime, sport, lot, chance, casualty, election of unknown or contingent event whatever, lose to any person so playing or betting, any sum of money or other valuable thing, amounting in the whole to the sum of \$10, and shall pay or deliver the same, or any part thereof, the person so losing and paying or delivering the same shall be at liberty to sue for and recover the money, goods or other valuable thing, so lost and paid or delivered, or any part thereof, or the full value of the same, by action of debt, replevin, assumpsit or trover or proceeding in chancery, from the winner thereof, with costs, in any court of competent jurisdiction. In any such action at law it shall be sufficient for the plaintiff to declare generally, as in actions of debt or assumpsit, for money had and received by the defendant to the plaintiff's use, or as in actions of replevin or trover upon a supposed finding and the detaining or converting the property of the plaintiff to the use of the defendant, whereby an action hath accrued to the plaintiff according to the form of this act, without setting forth the special matter. In case the person who shall lose such sum or other thing, as aforesaid, shall not, within six months, really and *bona fide*, and without covin or collusion, sue,

and with effect prosecute, for such money or other thing, by him lost and paid or delivered, as aforesaid, it shall be lawful for any person to sue for, and recover treble the value of the money, goods, chattels and other things, with costs of suit, by special action on the case, against such winner aforesaid, one-half to use of the county, and the other to the person suing."

To the declaration were interposed the general issue and a special plea setting up the two years' statute of limitations. Upon issue joined a trial by jury was had, which resulted in a verdict and judgment in favor of appellee for \$1,500.

The evidence shows that appellants, in 1898, were in the grain brokerage business at Mattoon, Illinois, and conducted speculations on the Chicago Board of Trade through Lamson Bros., a commission firm at Chicago. In the fall of that year they opened a branch office at Sullivan, Illinois, and placed the same in charge of one James Bathe. In the Sullivan office a blackboard was kept on which market quotations were placed as they were received, every fifteen minutes, by telephone from Mattoon. Bathe's duties were to receive quotations, place them upon the blackboard, receive orders from customers and telephone the orders to the Mattoon office. When the orders were received at the Mattoon office they were wired to Lamson Bros. at Chicago. Appellee's husband became a customer on December 22, 1898, and between that date and the 11th of March, 1899, traded quite frequently. He gave orders to Bathe at first and paid him something over \$300. He then began trading at the Mattoon office. He lost in all up to March 11, 1899, the day on which he ceased trading, \$1,040.

It is contended that this being an action for penalty, it is barred because the suit was not commenced until March 15, 1901, more than two years after the last payment was made. Section 14, Chapter 83, Rev. Stat., provides that actions for statutory penalty "shall be commenced within two years next after the cause of action accrued." Tabor had six months in which to sue. Appellee had no right to bring suit until the expiration of that period. It is plain,

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therefore, that no action accrued to her until six months after March 11, 1899, and the statute did not begin to run till the end of that six months. The statute of limitations affects only the remedy and does not commence to run until the party to be barred has a right to invoke the aid of the court to enforce his remedy.

It is contended that the court committed error against appellants in permitting appellee's witnesses to testify as to appellants' dealing with other customers than W. M. Tabor. We think such proof was entirely proper. If appellants were running a mere "bucket shop" instead of doing a legitimate brokerage business, what higher proof of that fact could be furnished than evidence of their course of dealings with customers generally? The testimony of Tabor clearly shows that the deals set on foot at the Sullivan office were nothing more than gambling contracts and that it was never contemplated by the parties that either the grain or the pork contracted for should be received or delivered. He was contradicted by Bathe and Staninger. In view of the conflict, it certainly was proper to show that in the dealings of appellants with their other customers at the same place, no grain or provisions were ever received or delivered. In order to bring purchases and sales for the future delivery of grain within the meaning of the statute sued upon, there must be a mutual intention upon the part of the seller and the buyer that the grain shall not be delivered or received. Such intention may be established, not merely by the assertions of the parties in that particular transaction, but by all the attending circumstances which may include similar transactions made with other persons at the same time and place. *Jamieson et al. v. Wallace*, 167 Ill. 388.

It is contended that the court erred in permitting Tabor to testify that he had no intention of receiving the grain when he ordered the same from appellants. The objection urged to such testimony is that he did not communicate his intention to appellants. In connection with his statement as to what Bathe told him when urging him to speculate,

there was nothing harmful or improper in the testimony. He stated: "Bathe told me that if I wanted to buy 1,000 bushels of wheat, I had to pay \$10; if the market went up a cent I could close it out at a gain of \$10; if it went down a cent, at a loss of \$10; said there was no delivery about it; said they simply dealt on the margin." He gave like testimony as to Staninger's representations to him. If those statements be true, it is manifest that appellants had no intention of receiving or delivering grain bought or sold for future delivery, but intended to settle by the payment of differences between the contract price and the future market price at some time after making the deal. To invalidate a contract for the purchase and sale of grain in the future, the intention of both parties to settle by the payment of differences must be shown. Having given testimony which clearly indicated appellants' intention, it was entirely proper for him to testify that he had a like intention in the transaction. How can it be said that appellants were prejudiced by Tabor's testimony upon the ground that he did not communicate his intention to them? By embarking in the speculation after the explanation of Bathe, above quoted, his intention was made manifest to them. Can any person familiar with this record believe for one moment that any one of the many deals would have been declared off by appellants had Tabor declared to them that he had no intention of taking the grain contracted for?

The statute upon which this suit is based contemplates that the loser in a gambling contract shall recover only the amount of his losses. If he elects to sue, he must do so within six months, and must prosecute his suit in good faith, without covin or collusion. He can not wait the six months and then maintain an action in the name of his wife or some other person for the purpose of recovering against the winner treble the amount of his losses. Such a thing would be fully as iniquitous as his original gambling contract. It would be far more despicable. We hold, therefore, in a suit brought to recover treble the amount of the losses, that the defendant should be allowed to prove, if

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he can, that while the suit is being prosecuted in the name of a third party it is really and truly the suit of the loser, and that he and the plaintiff have conspired together for the purpose of mulcting the defendant into the heavy penalty provided by the statute. *Cole v. Appleburg*, 136 Mass. 525. We hold, too, that this being an action in case such proof is admissible under the general issue.

An effort was made to show to the jury that such a conspiracy existed between Tabor and his wife, so it is urged, but the court refused to allow the proof. We desire to express no opinion as to how far the offer made tended to prove such conspiracy or collusion, but as the judgment will be reversed for other reasons and the cause remanded for another trial, we desire that the trial court shall have our views upon the right of a defendant to attack the good faith of the prosecution. Of course, statements made by Tabor, out of the hearing and without the knowledge or acquiescence of his wife, could be heard only by way of impeaching him as a witness.

Instructions to the jury should direct them that their belief upon disputed questions of fact should be based upon the evidence, and any instruction which does not contain the element of a finding "from the evidence" is vicious. Appellee's fifth and eighth instructions do not contain that element and are for that reason bad. Her ninth instruction is erroneous for that reason and the additional one that it makes appellants liable for losses of Tabor independent of whether the losses occurred in a gambling transaction as set up in the declaration.

A suit to recover treble the amount of money lost by gambling is an action for a penalty and must be brought in the county where the gambling was done and the money lost.

In other words the action is local and not transitory. *Johnson v. McGregor*, 157 Ill. 350; Chap. 28, Rev. Stat. Ill.; 31 Stat. Elizabeth, Ch. 5, Sec. 2; Tidd's 1, 3d Am. Ed., Sec. 340. It does not appear from the evidence that Tabor lost more than \$315 on orders given at Sullivan. Three hundred and fifteen dollars he paid in bank checks to Bathe.

He stated that he paid money to Bathe besides the checks, but his testimony was so vague on that point that a finding for money paid to Bathe, aside from the checks, could not be sustained. It is clear, then, that the amount of damages are excessive by \$555. But it is contended that as the losses suffered by Tabor on deals made at Mattoon, in Coles county, were paid through checks drawn on Tabor's bank account at Sullivan, the losses were paid in Moultrie county and could, therefore, be included in appellee's recovery. We entertain a contrary opinion. When Tabor delivered to Staninger a check for the payment of money out of funds which he had on deposit, subject to check in the bank at Sullivan, it was an assignment *pro tanto* to Staninger. *Munn v. Burch et al.*, 25 Ill. 35; *Bickford v. First National Bank of Chicago*, 42 Ill. 241; *Brown v. Leckie*, 43 Ill. 500; *Ridgely Bank v. Patton & Hamilton*, 109 Ill. 485; *Met. Nat. Bank of Chicago v. Jones et al.*, 137 Ill. 642; *Bank of Antigo v. Union Trust Co.*, 149 Ill. 352. If the check was to cover a loss on a deal made with Staninger at Mattoon, then the loss not only occurred in Coles county but was paid in that county.

For the errors indicated, the judgment will be reversed and the cause remanded for another trial.

Harry Bunn v. The People of the State of Illinois.

1. PRACTICE—*Insufficient Affidavit for Continuance*.—An affidavit for continuance which fails to state that there were no other witnesses by whom affiant could prove, or so fully prove, the facts which he expected to show by the absent witnesses, is not sufficient to warrant a continuance on account of the absence of such witnesses.

2. SAME—*Incapacity of Lawyer, When No Ground for Continuance*.—Where the issues involved are simple, both as to the facts and the law involved, and affiant knows, eighteen days before the date of trial, that the attorney whom he first employed to attend to the case, could not be present to try it, the want of time on his part to obtain other counsel to try the case properly after he discovered that the counsel he first engaged would not be able to be present at the trial, is not a sufficient ground for granting a continuance.

Bunn v. The People.

Bastardy.—Appeal from the County Court of McLean County; the Hon. R. A. RUSSELL, Judge presiding. Heard in this court at the November term, 1901. Affirmed. Opinion filed June 20, 1902.

A. J. BARR, JAMES L. LOAR and LIVINGSTON & BACH,
attorneys for appellant.

WOOD & ELMER, JESSE E. HOFFMAN and WELTY & STERLING,
attorneys for appellee.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

This was a proceeding under the bastardy act, commenced on June 26, 1901, by Kate Hutchinson, making complaint in writing under oath to a justice of the peace of McLean county that she is an unmarried woman and the mother of a child, then about one year old, which under the laws of this State is deemed a bastard, and that Harry Bunn is the father of said child.

On the day that the complaint was made, the justice issued to a constable of that county, a warrant for Bunn, and under it, on the same day, he was brought before the justice and a preliminary examination was then had by the justice who required him to give bond to answer the charge in the complaint at the next succeeding term of the County Court. Bunn gave bond as required, and on the 27th day of July, 1901, the justice filed with the county clerk, a transcript of his docket in the bastardy proceeding, and the original complaint, warrant and bond. The succeeding term of the County Court convened August 12, 1901, and on August 14, 1901, being the third day of the term, Bunn applied for a continuance and presented his motion and affidavit therefor as follows:

The defendant, Harry Bunn, limiting his appearance for the purpose of this motion, and this motion only, hereby moves the court to continue the above entitled cause until the next term of this court, and bases said motion on the following affidavit:

“Coming into court with his limited appearance for the purpose of filing this affidavit and making this motion only,

Harry Bunn, being first duly sworn, deposes and says, that he is the defendant in the above entitled action; that he can not safely proceed to the trial of this cause at the present term of this court, on account of the absence of many material witnesses, as will hereafter more fully appear. Affiant further says that the papers from W. B. Hendryx, who tried the case in the justice's court, were not filed in the office of the clerk of the County Court until July 27, 1901. That affiant did not know that the said case had been filed in said court until Tuesday, the 5th day of August, 1901. That the court for this term did not convene until two days ago. That he is wholly unprepared to go to trial at this time or at this term.

Affiant further states that for more than three years last past, Edward Maher, of the city of Chicago, Ill., has been his regular attorney. That after this case was commenced in this county last June, he employed the said Maher to defend affiant in this case. That the said alleged offense is claimed, so affiant is informed, to have been committed in the city of Chicago, on or about the 1st day of November, 1899. That said Maher knows several of the witnesses conversant with affiant's location and manner of living during such time and after said employment commenced, and affiant believes had almost finished the complete preparation of affiant's defense herein. That said attorney had obtained statements from various witnesses on his behalf, but affiant is unable to state all their names and unable to set forth in this affidavit all the facts which they can give in evidence, for the reason that all these facts and all their names have not been communicated to this affiant by said attorney, Edward Maher. That on the 27th day of July, affiant received a letter from his attorney, Edward Maher, that he was leaving for England, having been suddenly called there by cablegram announcing the very serious illness of his sister who lived there, and did leave for England on the 27th day of July, 1901. That affiant was further informed that the said Maher would return some time about the first of September, or a little later, and affiant believes that if this case be continued until the next term of this court, that the said Maher will have returned to this country from England and will be able to try this said case for affiant.

Affiant further states that he can not proceed to the trial of the said case without the services of said Edward Maher, for the reason that he can not employ any attorney who can prepare the case for trial at this term of the said

court. That no attorney in Bloomington can possibly procure the Chicago witnesses as well as the said Maher, the said Maher being especially well qualified to prepare and try this said case for the defendant owing to information and opportunities the said Maher derived in the conduct of other business for this defendant. That as soon as affiant learned that it was impossible for said attorney to be here, he employed A. J. Barr, of this city, to look after his said case for him, and they have been diligent in trying to procure the witnesses in affiant's behalf, but that they can not procure even the names of all the important witnesses in affiant's behalf, for the reason that Edward Maher is the only person who does know them, so affiant believes, but affiant states that if this case is continued until the next term of this court, affiant fully believes that they will be able to secure the names and the testimony of all such witnesses. That one J. P. Hayde, who is at this time a resident of the city of Chicago, in this State, is an important witness on behalf of the affiant, and if present at the trial of this cause would testify that the complaining witness in this case boarded at a certain boarding house at 174 Oakwood Boulevard, Chicago, at the same time that the said Hayde made his home at such boarding house, which was conducted and kept by a Mrs. Sheldon, and that while they were living as occupants of said boarding house, which was about the first of November, 1899, also some few weeks prior thereto, as well as a few weeks after said date, the complaining witness made a practice of and continued to go out from said house with different men who would call for her, and while out would visit different saloons, road houses and wine rooms, and was accustomed while doing so to become intoxicated and otherwise conducted herself in an unchaste way. That on returning from one such trip she signaled the said Hayde by rapping on his window at about half past two o'clock in the morning and asked him to open the window that she might get in the house without the other inmates being aware of the time of her return or her condition.

Affiant says that he expects to prove by the said Hayde that at such time he raised the window opening from the street into his own room and assisted the said Mrs. Hutchinson, the party complainant in this cause, into the house through said window, and that she was at such time in a very base state of intoxication.

Affiant further says that he expects to prove by the said Hayde that the said Mrs. Hutchinson admitted to him at

that time that she had been out spending the evening with a man or men, and that while so spending the evening she had become intoxicated.

Affiant says that he further expects to prove by the said witness that the complainant, Mrs. Hutchinson, frequently did, and was in the habit of giving money to gentlemen with whom she went out to spend the evening for the purpose of paying the expenses of the evening and as an inducement for them to accompany her on the previously mentioned orgies.

Affiant further says that a man who formerly lived in Chicago, at the boarding house above mentioned, whose name affiant understands to be Ridenhour, whose first name affiant does not know, and whose present address is also unknown to affiant, but affiant is informed that said witness is now living somewhere in the State of Maryland, and who, if present, would be an important witness on behalf of affiant, in that he expects to prove by the said witness that the complainant, Mrs. Hutchinson, about the first of November, 1899, while living at the boarding house above mentioned, told to the said witness, Ridenhour, while sitting at a cafe drinking intoxicating liquors, that she had just been caught by a wife in the said wife's husband's rooms, in a compromising position, about eleven o'clock of the same night; that she was very nervous and terribly wrought up over the matter, and was seeking advice and assistance from the said witness in order that she might not be mentioned in divorce proceedings that she feared would be commenced by the said wife against the husband. Affiant says that he does not know positively whether his attorney, Mr. Maher, knows the address of the said witness or not, but believes that the said attorney will be able to locate said witness and have his testimony here in this court at the next term thereof, if this case be continued.

Affiant further says that one Mrs. L. M. Sheldon, the lady who kept, at the times mentioned, and still conducts said above mentioned boarding house, is an important witness on affiant's behalf, and if present would testify that while the complainant was living in her house she told the said complainant that she could not afford to have her remain in said house and continue to visit saloons, wine rooms, etc., at all hours of the night, with gentlemen who called for her at such times, and that she told her at different times that she could not afford to have her seen leaving her house and going to such places at all hours of the night, as she had been doing in the past. Affiant further

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says that he expects to prove by the said Mrs. Sheldon that the complainant has been twice married; that she had one child by each of said husbands; that while she was living at her house she would go away in company with different men, sometimes remaining away all night, leaving the care of said children to the boarders who would happen to hear them crying.

Affiant further says that he can not safely go to trial without a witness by the name of William DeLaney, who was a boarder at the said boarding house at and about the first of November, 1899, and who occupied the adjoining room to the complainant, Mrs. Hutchinson, and who, affiant believes, would swear, if here, that the said Mrs. Hutchinson, about the time mentioned, frequently came into his room after he had retired, and would sit on the side of the bed he was occupying, and otherwise visit with the said witness; that said complainant had frequently given to said witness money with which to pay expenses of evening entertainments. Affiant says that his said attorney, Maher, is conversant with other facts expected to be proven by the said witnesses, which facts are not familiar to said affiant and therefore can not be specifically stated.

Affiant further says that he can not safely go to trial without a certain witness whose name is unknown to affiant, but who, he believes, either has been or can be located by his said attorney, Maher, and who was a resident of the city of Chicago, and who was connected with the Elevated Loop Railroad in the capacity of a superintendent, who, affiant is informed and believes, would testify if present at the trial of this cause, that along about the first of November, 1899, he, the said witness mentioned, sent a carriage to said boarding house at about half past nine o'clock in the evening with a note to the complainant; that she went away in said carriage, and, with said witness, visited Smith's road house and wine room, where she became intoxicated, and afterward went with the said witness to the Great Northern Hotel, where complainant and said witness had a misunderstanding, and complainant left said witness, returning home at about two-thirty in the morning. The following day the complainant was very ill and was visited at said boarding house by the said witness. Affiant says that in the month of July, 1900, in the State of Michigan, the complainant in this cause had affiant arrested on the charge upon which he is now brought into court; that Mr. Maher, his attorney referred to, is thoroughly conversant with said litigation in the State of Michigan, wherein affiant is charged

by complainant with being the father of the same child that she now seeks to charge him with being the father of in this proceeding. That affiant has depended upon said attorney solely, for any information of said litigation which might be beneficial in the trial of this cause, and affiant believes that said adjudication is a complete bar and adjudication of the case at bar.

Affiant further says that since being notified by his said attorney, he has been telegraphing and trying to get this case prepared in a way which would justify him in going to trial at this term of the court, using all means at his command to do so; that he has been advised by the attorney hired by him since receiving the announcement of his attorney, Maher's, departure for England, that owing to the absence of the said Maher and the complicated circumstances of this case, it would be impossible for him or any other lawyer in Bloomington or Chicago to properly prepare and try this cause at this term, during the absence of the said Maher, and affiant believes that it would be impossible for any lawyer not familiar with the circumstances in this case to try this case at this term of court without sacrificing the interest of this defendant, for the reason that the said Maher has information and valuable papers relative to this proceeding that it is impossible for this affiant to get until the said Maher's return. That he believes that he can have, by the next term of this court, the deposition of the witnesses heretofore mentioned, in which depositions they will swear substantially to the matters set forth herein, and this affiant desires to do.

Affiant further says that the said Maher had evidence of importance in this case which he is unable to set forth in this affidavit, for the reason that it has been left wholly to Mr. Maher's management, and he is unable to get such information or evidence on account of the sudden calling away of the said Maher to a foreign country. He asks this court to continue this case in order that the deposition of the said witnesses may be taken to be used herein, and that this defendant may have an opportunity to get the papers which Mr. Maher personally holds, pertaining to this case, and such other information as he has obtained, not only in the preparation of this case, but in his connection with the suit in Michigan about the same cause of action, and also other litigation which affiant believes to be closely connected with this suit, and to be highly important.

Affiant says that this motion is not made, or continuance asked, for delay, but that justice may be done, and that he

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may be enabled to prove his innocence of the charges made against him in this case, as he positively is in no wise responsible for the paternity of the child in question, and is not guilty as accused by the complainant herein; and since the filing of this case in this court your affiant has not had sufficient time, under the statute, to take the deposition of the witnesses accessible, to affiant's knowledge; that the statute gives him a right to take their deposition, and he desires to avail himself of the statutory right. That affiant further states that he this day telephoned to Chicago to the office of the said Edward Maher, and was informed by the attorney in said office that Edward Maher was in Liverpool and would not return until the first of September, 1901."

The motion for continuance being denied, Bunn excepted. Then, although he was personally present in court and attended by counsel, he stood mute, and the court entered for him a plea of not guilty to the charge in the complaint. The proceeding was then called for trial, a jury impaneled and sworn to try the issue of whether Bunn was the real father of the child as charged in the complaint, and evidence was heard, but was not preserved by bill of exceptions. Both when impaneling the jury and when taking the evidence, Bunn was present and was called upon to take part and given an opportunity to offer his evidence, but he remained mute. The jury, after hearing the evidence and argument for the people, was instructed in writing by the court, "that if they believed from the evidence that the prosecutrix, Kate Hutchinson, was delivered of a bastard child, and that when she became pregnant with such child and at the time of filing her complaint herein, she was an unmarried woman, and if they further believed from the evidence that the defendant, Harry Bunn, is the father of such bastard child, they should find the defendant guilty." And were also further instructed in writing that if they find the issues for the plaintiff, the jury shall say, "We, the jury, find the defendant guilty, and that he is the real father of the child, as charged in the complaint." And that if the jury find the issues for the defendant they shall say, "We, the jury, find the defendant not guilty."

The jury returned a verdict as follows: "We, the jury,

find the defendant guilty, and that he is the real father of the child as charged in the complaint."

Bunn moved for a new trial, but it being denied, he excepted. He then moved in arrest of judgment, but that being also denied, he again excepted. The court then entered a judgment on the verdict, finding that the complaining witness, Kate Hutchinson, is an unmarried woman, and was delivered of a bastard child on August 2, A. D. 1900, of which defendant, Harry Bunn, is the real father; and that "it is therefore ordered and adjudged by the court that the defendant, Harry Bunn, pay the sum of one hundred dollars for the first year, from August 2, 1900, and fifty dollars yearly, for the nine years succeeding said first year, for the support, maintenance and education of said child, and also the costs of the proceeding. It is also ordered by the court, that said defendant, Harry Bunn, give bond as provided by statute, to the satisfaction of the court, with sufficient security to be approved by the court, for the payment of the aforesaid sums of money * * * in equal quarterly installments to the clerk of this court."

Bunn, having excepted to the entry of the judgment, prayed and was allowed an appeal to this court, and to reverse the judgment, insists that the trial court erred in denying his motion to continue; erred in giving an improper instruction to the jury; erred in denying his motions for a new trial and in arrest of judgment; and erred in entering an improper judgment.

As the affidavit for continuance failed to state that there were no other witnesses by whom Bunn could prove, or so fully prove, the facts which he expected to show by the absent witnesses, it was not sufficient to warrant a continuance on account of the absence of such witnesses. *Dunn v. The People*, 109 Ill. 635; *Hodges v. Nash*, 141 Ill. 391; *Jarvis v. Shacklock*, 60 Ill. 378; and *McKichan v. McBean*, 45 Ill. 228.

It is manifest that the issues involved in this proceeding are simple, both as to the facts and the law involved, and for that reason Bunn could have secured competent coun-

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sel to properly try the case in the eighteen days intervening between July 27, 1901, and August 14, 1901, as the affidavit shows that he knew for that length of time that the attorney whom he first employed to attend to the case, could not be present to try it, and therefore it was not a sufficient cause to continue for want of time on his part to obtain other counsel to try the case properly after he discovered that the counsel he first engaged would not be able to be present at the trial. *Jarvis v. Shacklock, supra*, and *Condon v. Brockway*, 157 Ill. 90.

And while the affidavit attempts to show that Bunn used diligence in trying to obtain the names and attendance of persons by whom he could also show material facts proper in his defense, and in trying to obtain a certified copy of the proceedings in the case commenced in Michigan, yet it falls far short of showing facts from which the court could see that he had used reasonable diligence in that regard. For aught that can be gleaned from the affidavit, he and his counsel, employed subsequently to July 27, 1901, only telegraphed and telephoned to Chicago for that purpose, but when and to whom does not appear.

The proper administration of justice requires that parties to a suit should use all reasonable diligence to be prepared for trial thereof in all cases after they have had such time as will enable them to do so by the use of reasonable diligence to attain that end; for otherwise, justice would be administered tardily when it should be obtained without unnecessary delay.

We are clearly of opinion that the court properly refused the continuance on the showing made by the affidavit.

It is contended that the instruction improperly directed the jury to find the defendant guilty without requiring them to believe from the evidence that the mother was unmarried at the time the child was born, as well as when she became pregnant, and when she filed the complaint.

When fairly considered, we do not think that the instruction is open to the objection urged, for manifestly the jury would understand, from the language employed in it, that

they were required to find the defendant guilty upon their believing from the evidence that the mother was unmarried at the time the child was born, as well as when it was begotten, and when the complaint was filed; for how else could they so understand it, since the instruction required them to believe from the evidence that she was "delivered of a bastard child."

Besides, in the absence of the evidence being before us, we must presume that it warranted the court in giving the instruction in the form in which we find it in the record, as well as warranting the jury in convicting the defendant. From what we have said, it is plain that the court properly refused to grant the defendant a new trial.

The contention that the court was without jurisdiction to try the case because the complaint fails to show that the mother of the child was an unmarried woman at the time the child was born, is also without force, for the reason that the sworn statement contained in it is, "that she is (at the time the complaint was made, June 26, 1901) an unmarried woman, and is the mother of a child which, under the laws of the State of Illinois, is deemed a bastard, * * * said child being now about one year old," sufficiently shows that she was an unmarried woman when the child was begotten, born, and the complaint was made, for the purpose of giving the court jurisdiction; for if the mother was not unmarried when the child was begotten, born, and the complaint was made, how could the child be deemed a bastard under the laws of the State of Illinois at the time the complaint was made, when, by the laws of the State, a child is only deemed a bastard under such circumstances, when, during such entire time, the mother is an unmarried woman?

While the language used in the judgment, as entered in this case, does not show as clearly as it might when the first year after the birth of the child begins, and for which defendant is required to pay \$100, yet, in effect, we think it does sufficiently show that it is the year beginning August 2, 1900, and therefore there is no prejudicial error

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committed against appellant by the judgment as it is written.

Finding no reversible error was committed by the trial court the judgment will be affirmed.

Noah Markee v. The People of the State of Illinois.

1. *PRACTICE—Motion in Arrest of Judgment.*—A motion in arrest of judgment must be predicated upon some intrinsic defect in the indictment and can not be sustained for any matter not affecting the real merits of the offense charged in the indictment.

2. *SAME—Where Officer in Charge of Jury is Not Sworn.*—Where defendant made no motion for a new trial in the trial court, he is not in a position here to insist that the trial court erred in not having the officer in charge of the jury sworn.

3. *SAME—Certifying Indictments to County Court for Process and Trial.*—Under the express provisions of section 120 of chapter 37, Hurd's R. S. 1901, entitled "Courts," when the grand jury of the Circuit Court shall indict for offenses cognizable in the County Court, such indictments may, in the discretion of said Circuit Court, be certified under the seal thereof to the County Court for process and trial, at any time before trial, and in case of *capias* issued, arrest made, or bail taken in the Circuit Court before said indictments are so certified, such facts shall in like manner be certified to said County Court, and the same proceedings shall thereafter be had thereon in the County Court in all respects as could be had in said Circuit Court.

4. *CONSTRUCTION OF STATUTES—Before Proviso Added.*—The construction given to a statute without a proviso will not apply to it after a proviso has been added.

Indictment for Selling Intoxicating Liquors Without a License.
—Error to the County Court of Schuyler County; the Hon. H. V. TEEL, Judge presiding. Heard in this court at the November term, 1901. Affirmed. Opinion filed June 20, 1902.

B. O. WILLARD, attorney for plaintiff in error.

T. E. BOTTENBERG, state's attorney, for defendant in error.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

Plaintiff in error, Noah Markee, was indicted by the

grand jury of the Circuit Court of Schuyler County for selling intoxicating liquors without having a license. The indictment was in every respect full and complete, containing seventy-two counts, each properly charging him with an offense.

When the indictment was returned into court, there was written on the back of it as folded (the last leaf being blank) the following, to wit: "The People of the State of Illinois v. *Noel Markee*. Indictment, selling liquor. A true bill." The signature of the foreman of the grand jury being added.

After the indictment was returned, plaintiff in error was arrested on a bench warrant and brought into court, where he waived arraignment, pleaded not guilty and gave bond to answer the charges in the indictment, after which, with the consent of plaintiff in error, the Circuit Court entered an order that the case be certified to the County Court of Schuyler County for trial. The clerk of the Circuit Court made a transcript of the record in the case and filed it in the County Court, but in making it out, by mistake, omitted to put in it that plaintiff in error had waived arraignment, pleaded not guilty and given bond, and that the court had ordered the case certified to the County Court for trial.

With the transcript incomplete on account of this omission plaintiff in error moved the County Court to quash the indictment, and before disposing of the motion, the court, on application of the state's attorney, ruled the Circuit Court to file an amended transcript of the record in the case, which he did, and it contained what had been omitted before by mistake. The court then overruled the motion to quash.

The case was tried by jury in the County Court without plaintiff in error having been further required to plead to the indictment, and resulted in a verdict finding him guilty under thirty-two counts of the indictment.

After the jury had heard the evidence and were sent out to deliberate and find a verdict, they were in charge of the deputy sheriff, who had not been specially sworn to attend them in the case, as provided by statute.

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After the verdict was returned, plaintiff in error moved in arrest of judgment and to dismiss the case for want of jurisdiction in the County Court to hear it. Both motions were overruled and plaintiff in error preserved an exception.

The court, under the verdict, adjudged that plaintiff in error be imprisoned in the county jail for ten days; that he pay a fine of \$440 and the costs, and that he stand committed to the county jail until said fine and costs were paid; to which he excepted.

He has brought the case to this court by writ of error, and to effect a reversal of the judgment, insists that the County Court erred in overruling his motion in arrest of judgment and his motion to dismiss the case for want of jurisdiction, and erred in not having the officer in charge of the jury properly sworn.

The court properly overruled the motion to quash the indictment for the reason that the indictment itself was against the plaintiff in error and correctly charged him with the offenses, and it had been properly ordered certified to the County Court for trial, and the omission of the clerk of the Circuit Court, by mistake, to show that fact in the transcript, was properly supplied on being discovered, and when supplied, justified the court in overruling the motion to quash; nor did the court err in overruling the motion to quash on account of the back of the indictment being indorsed "The People of the State of Illinois vs. *Noel Markee*," instead of *Noah Markee*, as in the body of the indictment, for the reason that such indorsement was no part of the indictment.

And the court properly overruled the motion in arrest of judgment for the reason that that motion must be predicated upon some intrinsic defect in the indictment and can not be sustained for any matter not affecting the real merits of the offense charged in the indictment. *Winship v. The People*, 51 Ill. 296. And there was no such defect in this indictment, nor was there any other intrinsic defect on the face of the record after the circuit clerk had filed the amended transcript, for it then appeared that the case had

been properly certified to the County Court; that plaintiff in error had waived arraignment, and pleaded not guilty to the charge in the Circuit Court, and therefore it was unnecessary for the County Court to require him to be arraigned or to again plead. *Gardner v. The People*, 3 Scam. 83.

Plaintiff in error made no motion for a new trial in the trial court, and hence is not in a position here to insist that the trial court erred in not having the officer in charge of the jury sworn.

And the court also properly overruled the motion to dismiss for want of jurisdiction for the reason that the County Court, under the showing made by the record in this case, had jurisdiction thereof under the express provisions of section 120 of chapter 37, Hurd's R. S. 1901, entitled "Courts," which is as follows:

"When the grand jury of the Circuit Court shall indict for offenses cognizable in the County Court, such indictments may, in the discretion of said Circuit Court, be certified under the seal thereof to the County Court for process and trial, which process shall be the same as like process in the Circuit Court; and the said County Court in term time, or the judge thereof in vacation, shall fix the amount of bail to be required of the accused, and shall forthwith, on the receipt of such certified indictment, order a *capias* in each case, which *capias* the clerk shall issue, either in term time or vacation, indorsing upon the same the amount of bail required of each defendant by the court or judge. When such *capias* is executed in term time, and the court being in session, the sheriff shall bring the defendant into court forthwith; but if the court shall have temporarily adjourned, the sheriff shall, if sufficient bail be offered, take bond in the amount named in the *capias*, conditioned for his appearance in said court on the day and hour to which it stands adjourned, and when the *capias* is executed in vacation, the sheriff shall, in like manner, take bond conditioned for his appearance in County Court as the law directs in cases of recognizances in the Circuit Court; and in default of such bond shall commit the defendant to jail, there to await trial. The judge of the County Court shall have power to receive a plea of guilty to an indictment and to pass judgment thereon, as well in vaca-

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tion as in term time; and the said County Court, or the judge thereof in vacation, shall have like power to order the clerk to issue *capias* on information filed, as is by this section given in cases of certified indictments; *Provided*, such indictments may be certified to said County Court as above provided, at any time before trial, and in case of *capias* issued, arrest made, or bail taken, in the Circuit Court before such indictments are so certified, such facts shall, in like manner, be certified to said County Court, and the same proceedings shall, thereafter, be had thereon in the County Court in all respects as could be had in said Circuit Court, or as if *capias* were issued, arrest made, or bail taken as above provided."

The proviso in the section was added thereto in 1885 and subsequently to the construction given it without the proviso in *Fanning v. The People*, 10 Ill. App. 70. So the construction given to its provisions in that case will not apply to it since the proviso has been added.

Under the showing made by the record before us in this case, there is no doubt but that plaintiff in error was properly charged and convicted, and the judgment pronounced is eminently proper, and ought to, and will be affirmed.

Elizabeth Dickerson v. Lyda Gritten.

1. WRITTEN INSTRUMENTS—*Proof Necessary to Impeach Certificate of Acknowledgment*.—While the certificate of the acknowledgment of a deed may be impeached, it has been repeatedly held in this state that the proof to sustain such charge must be of the clearest, strongest and most convincing character.

2. DOWER—*In Lands Held in Trust*.—One who holds land in trust only, is not seized of an indefeasible estate of inheritance, and his wife can have no right of dower in it.

Bill to Set Aside a Conveyance.—Appeal from the Circuit Court of Douglas County; the Hon. WILLIAM G. COCHRAN, Judge presiding. Heard in this court at the November term, 1901. Reversed and remanded. Opinion filed June 20, 1902.

Appellee, a resident of Vermilion county, filed her bill in chancery in the Circuit Court of Champaign County, in

which she stated that she was married to one Laban Gritten and resided with him as his wife prior to 1893, when she was divorced from him on account of his fault; that during the marriage, on, to wit, February 11, 1899, and prior thereto, Gritten was the owner in fee simple of section nineteen, township twenty-one, range fourteen west of the second P. M., in Champaign county, Illinois; that on said date a quit-claim deed was executed and delivered to Elizabeth Dickerson conveying said land to her, and that the deed purported to be signed by Laban Gritten and appellee, his wife, by their respective marks, and purported to have been acknowledged by them on that date before one David Crawford, a notary public of Champaign county; that she did not sign said deed, or authorize such signature, and had no knowledge of the existence of such deed until about May, 1894; and that the said deed is a forgery. She prayed for a cancellation of the deed and asked for a decree declaring that she had an inchoate right of dower in the land.

Appellant filed an answer denying that Laban Gritten was ever the owner of the land and averred that the conveyance was made from her husband, Ezra Dickerson, to Laban Gritten for the purpose of securing Gritten from loss by reason of his becoming security for Dickerson, and averred that appellee and her husband joined in the execution of the deed to appellant. She afterward filed an amended answer, in which she denied that Laban was ever the owner of the land or had any interest in it, and averred that the conveyance made by Dickerson and her to Gritten was made under the advice of one David Crawford, a notary public of that county, for the purpose of enabling a conveyance to be made to appellant, Crawford advising that a man could not make a conveyance of land direct to his wife. The amended answer further avers that appellee knew the reason for making such conveyance and voluntarily joined in the deed of February 11, 1889.

The case was referred to the master in chancery to take the evidence and report conclusions of law and fact. The

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master reported that Crawford, the notary public, had a bad reputation for truth and honesty; that his certificate of acknowledgment was impeached and that appellee never executed the deed in question. He further found that the land in question was conveyed by Ezra Dickerson to Laban Gritten for the purpose of having Laban Gritten convey the same to Dickerson's wife, the appellant; that such conveyance was accepted by him for that purpose and was afterward acted upon by him accordingly; that such conveyances were voluntary and that no consideration ever passed either from or to the said Laban Gritten, and that Laban Gritten was never in possession of the land under such conveyance; that Laban Gritten was never seized of an indefeasible estate of inheritance in said premises and that in no event could the complainant be vested with an inchoate right of dower.

Exceptions were filed to his report and overruled by him. The revenue was changed from Champaign to Douglas county because the presiding circuit judge, F. M. Wright, had at one time been interested in the subject-matter of the case as an attorney.

The cause came on for a hearing upon exceptions to the master's report. The court overruled the exceptions as to the finding of the master that the deed was not executed by appellee, but sustained them as to the other findings, and rendered a decree finding that the deed was not the deed of appellee and that she had an inchoate right of dower in the premises described. By its decree, the court canceled the deed so far as appellee was concerned and entered judgment against appellant for costs.

JOHN J. REA, attorney for appellant.

W. R. BLACKBURN, attorney for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

In this case two questions are presented for decision: First. Did appellee join in the execution of the deed to appellant? Second. Was Laban Gritten seized of such

an indefeasible estate in the premises described in the deed as would entitle appellee to dower therein upon his death?

It appears in evidence without dispute that Laban Gritten executed the deed. But it is contended that appellee's signature to it is a forgery, and that the officer's certificate of acknowledgment, so far as she is concerned, is false and fraudulent. In addition to the certificate of the notary, David Crawford, we have in the record the testimony of three witnesses, Laban Gritten, Ezra Dickerson and William Hines, who stated positively that they were present and heard appellee direct Crawford to sign her name to the deed, and heard her acknowledge to him that she executed it. Opposed to that evidence we have the testimony of appellee denying that she at any time directed Crawford to sign her name to the deed, and denying that she ever acknowledged her execution of it to him. As tending to corroborate her, she introduced testimony showing that she was able to write her own name, and did so when executing deeds, and was not compelled to sign by mark, and that Crawford's reputation for truth and honesty was bad. It is insisted also that the absence of the original deed, and the vague proof as to what had become of it, is a circumstance in support of appellee.

When the testimony was taken Crawford was dead. Quite a number of witnesses testified that his reputation for truth and honesty was bad, while there are others who testified that it was good. There was also testimony tending to impeach Laban Gritten by showing that he had stated in the presence of witnesses that appellee did not sign the deed. There are many other conflicts, and we are forced to say, after a careful consideration of the entire testimony, as it appears in the master's report, that we are unable to reach a satisfactory conclusion upon the question of whether she executed the deed. Our minds are left in grave doubt.

While the certificate of the acknowledgment of a deed may be impeached, it has been repeatedly held in this state that the proof to sustain such charge must be of the clear-

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est, strongest and most convincing character. *Kerr v. Russell*, 69 Ill. 666; *Canal and Dock Co. v. Russell*, 68 Ill. 428; *Lickmon, Executor, v. Harding*, 65 Ill. 505; *Russell v. Baptist Theological Union*, 73 Ill. 337; *Heacock v. Lubuke*, 107 Ill. 396; *Sassenberg et al. v. Huseman et al.*, 182 Ill. 341. In *Russell v. Baptist Theological Union*, *supra*, Chief Justice Walker said:

"It is a rule that the acknowledgment of a deed can not be impeached for anything but fraud, and in such case the evidence must be clear and convincing beyond a reasonable doubt; and while the making of a false certificate would be a fraud upon the party against whom it is perpetrated, there is in favor of the officer the fact that he is under his official oath when he makes the certificate, and the liability to indictment, conviction and infamy is certainly as strong incentive to truthful and honest action as is the restraint imposed on an interested witness, struggling for the gain following success in a suit, and escaping loss by defeat."

When we apply to the evidence in this case the doctrine announced in the cases cited, we do not feel justified in holding that appellee did not sign the deed.

Upon the other questions, however, we entertain no doubt. The evidence convinces us that when Dickerson conveyed the land to Gritten it was not in pursuance of any bargain to sell, but was done for the purpose of getting the title into Dickerson's wife, the appellant, in order that the land might not be reached by creditors of Dickerson. Dickerson and his wife were living upon the land at the time and had occupied it as their home for a number of years. They continued to occupy it and control it after the conveyance the same as before. While there is some proof that Gritten exercised certain acts of ownership, it is of a vague and uncertain character and we think that what he did do in that direction was explained in a manner consistent with the contention that he was not in fact the owner. His statements that he was the owner, made to third parties, and the unsworn answer to a suit in equity to set aside the conveyance because fraudulent as to creditors were not sufficient to overcome the proofs of appellant as

to the actual ownership and occupancy of the land. No doubt he and Dickerson, under the advice of Crawford, and for the purpose of making effective the scheme of getting the title into appellant so that the land could not be reached to satisfy claims against Dickerson, represented that the transaction was a *bona fide* sale, but evidence of such representations could only be regarded in the light of impeachment of them as witnesses. They could not be considered by way of estoppel against appellant. Notwithstanding such representations, the facts remain that Gritten never took, or attempted to take, possession of the land or any part of it; that he never received any of the rents or profits of the land; that Dickerson continued in the possession and control of the land, just as he had before the deed to Gritten was executed, and received the rents and profits just as he had before, and that a conveyance was soon made in pursuance of the agreement that Gritten should be the medium, merely, of the voluntary conveyance from Dickerson to his wife.

As Gritten held the land in trust only, he was not seized of an indefeasible estate of inheritance and his wife could have no right of dower in it. *Bailey v. West*, 41 Ill. 290; *King v. Bushnell et al.*, 121 Ill. 656. So whether she executed the deed or not, she had no standing in a court of equity and her bill should have been dismissed for that reason.

The decree will be reversed and the cause remanded, with directions to the Circuit Court to dismiss the bill.

Mr. Justice WRIGHT took no part in the decision.

William H. Mills v. Oscar Larrance.

1. EVIDENCE—*Costs—Judgments*.—Defendant obtained judgment on two judgment notes which, with attorney fees, amounted to \$1,055. After execution was levied plaintiff had judgment opened, and claimed that he owed only \$300.70, and that the amount had been tendered, together with costs up to the time of tender. On the trial the question of

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tender was decided against plaintiff, and the judgment was reduced to \$300.70, which plaintiff paid, together with costs of suit, amounting to \$256.21. Afterward plaintiff commenced an action against defendant for excessive levies under the two judgment notes and was permitted by the court to prove as part of the expense which he had incurred in defending against the collection of the \$1,055 judgment, that he had been thereby compelled to pay the \$256.21 court costs which had been occasioned thereby. *Held*, that the admission of such evidence was error for the reason that plaintiff admitted that he owed defendant a balance of \$300.70 on the notes upon which that judgment had been rendered, and claimed that he had tendered that amount, together with costs up to the time of the tender, which defendant denied, and on the question of whether such tender had been made, plaintiff lost, and the costs for that reason were adjudged against him, and that adjudication is binding upon both plaintiff and defendant.

Trespass on the Case, for excessive levies. Appeal from the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge presiding. Heard in this court at the November term, 1901. Reversed and remanded. Opinion filed June 20, 1902.

D. D. EVANS and GUY M. McDOWELL, attorneys for the appellant.

ROBERT W. FISK, S. M. CLARK and GEORGE T. BUCKINGHAM, attorneys for appellee.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

On April 12, 1901, the appellee, Oscar Larrance, began an action on the case in the Circuit Court of Vermilion County against the appellant, William H. Mills, which was tried by jury and resulted in a verdict and judgment in favor of appellee for \$4,000 damages.

Appellant moved for a new trial, which being overruled, he brings the case to this court by appeal, and, to effect a reversal of the judgment, insists that the verdict is not supported by the evidence; that the court admitted improper evidence for appellee; and that the damages are excessive.

The declaration contains three counts. The first avers that on October 16, 1900, appellee was possessed of personal property of the value of \$3,000, and was indebted to appel-

lant in the sum of \$300.82 on two promissory notes; that appellant, well knowing the premises, for the purpose of oppressing and wronging appellee, on that day, by virtue of the power of attorney attached to the notes, without notice to him, procured a judgment in the Circuit Court of Vermilion County against him on the notes for the sum of \$1,055; that in furtherance of said purpose, appellant placed an execution issued on the judgment in the hands of the sheriff and willfully and maliciously caused him to levy the same on all of said personal property, and to hold the same by virtue of the levy for a long time, to wit, three months.

The second avers that on October 29, 1900, appellee was indebted to appellant \$420 for rent, and then and there offered and tendered same to him, but he refused it, and on that day issued a distress warrant against appellee for said rent and wrongfully, oppressively and maliciously caused an agent of his to levy the same upon the crops and personal property of appellant of the value of, to wit, \$3,000, and to take and hold the same under the levy, until, to wit, January 29, 1901, at which time appellant accepted the tender and dismissed all proceedings under the warrant.

The third avers that on the 16th of October, 1900, appellee was indebted to appellant on two promissory notes in the sum of \$300.82—the notes having been originally given for about \$1,000, on which appellee was then entitled to credits of about \$700; and appellant, well knowing the premises, willfully, maliciously, and for the purpose of oppressing and wronging appellee and to injure him in his credit, by virtue of the power of attorney attached to the notes, without notice to him, procured a judgment in the Circuit Court of Vermilion County against him upon the notes, for the sum of \$1,055; that he caused an execution to issue on the judgment and placed it in the hands of the sheriff of said county; that in furtherance of said purpose, and to injure appellee in his financial standing and credit, appellant willfully and maliciously directed the sheriff to levy the execution upon all the goods and chattels of appellee of the value, to wit, \$3,000, and wrongfully and

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maliciously directed him to hold the goods and chattels by virtue of the levy for a long time, to wit, three months; by reason whereof appellee was unable to have or use the goods and chattels.

And in the declaration, appellee claimed \$20,000 damages for the detention of his property, injury to his credit, and expenses incurred in setting aside the judgment and defending the suit on the notes and the distress proceeding.

The evidence shows that appellant and appellee had been for some time before the transactions out of which this suit was commenced, on intimate business relations. For several years appellee had been a tenant of appellant, and from time to time had borrowed money of him for which notes were given. Among the notes thus given, was one dated December 23, 1898, by which appellee, together with one J. C. Larrance, promised to pay appellant \$350 one day after date, with interest at seven per cent per annum after date until paid; and another dated April 25, 1900, by which appellee and said J. C. Larrance promised to pay appellant, one year after date, \$552.04, with interest at seven per cent until paid. Attached to each note was a power of attorney, signed by the makers of the note, in which they irrevocably authorized any attorney at any time after date of the note to confess judgment upon the same for such amount as may appear unpaid thereon, together with costs and ten per cent attorney's fees. On October 16, 1900, appellant caused a judgment to be entered in the Circuit Court of Vermilion County in his favor by confession on the two notes under the respective power of attorney attached to each, for the sum of \$1,055, it being the amount appearing to be due him thereon. On the same day the judgment was rendered, appellant procured an execution to be issued on the judgment, and the same was delivered to the sheriff, who sent it to his deputy, living near where appellee was living.

On October 17, 1900, appellant saw the deputy sheriff, and, as testified to by the deputy, told him to levy the execution on all the property which appellee had, and for that

purpose, went with the deputy to the farm where appellee was living, and showed him appellee's corn and other personal property. The deputy sheriff then informed appellee that he would levy the execution on his corn, then shucked and cribbed; on his farm wagons, implements and live stock; all of which in value is variously estimated to have been then worth from \$1,800 to \$3,000. The deputy, when he was at the farm to make the levy, told the two hired men of appellee that he would appoint them the custodians of the property for the sheriff, until appellee should give him a forthcoming bond, which was done the same, or the next day.

The indorsement of the levy upon the execution was not made thereon, however, until November 14, 1900.

Upon proper application made to the Circuit Court, an order was made opening the judgment that had been confessed, staying the execution and permitting appellee to defend against the notes; and he set up that he had paid appellee all but \$300.70 on the \$552.04 note, and that it had been given in settlement of the \$350 note, and a balance which appellee owed appellant on another note.

The suit on the two notes was tried by jury on June 7, 1901, and appellant recovered a verdict and judgment for \$300.70, besides the costs, which amounted to \$256.21.

Upon that trial there was a serious conflict in the evidence as to whether or not, on a fair adjustment between them, appellee was or was not indebted to appellant for the full amount of the two notes, or for only \$300.70. Appellee paid the \$300.70 judgment and the \$256.21 costs, which discharged the \$1,055 judgment and released the levy of the execution on the property.

On October 24, 1900, appellant issued to an agent, his landlord's warrant for the rent of \$120 then due him from appellee, on the ninety acres of land upon which the corn levied upon under the execution had been grown. The agent proceeded at once to where the corn was, and indorsed a levy upon it on the warrant, and on October 29, 1900, he filed the warrant so indorsed with the clerk of the Circuit

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Court, who issued a summons thereon to the sheriff for appellee to answer the charge therein contained for the rent, at the January term, 1901, of the court.

A short time before the landlord's warrant was issued, appellee, through a grain dealer, offered to pay appellant the \$420 rent upon his giving up the written lease for the land, but he declined to receive it and give up the lease, for the reason, among others, that the term therein granted did not expire until March 1, 1901.

At the January term, 1901, appellee paid the \$420 rent money into court for appellant, and he accepted it and dismissed the distress proceedings therefor at his costs.

Appellant testified that all he told the deputy, when he went with him to appellee's farm, was for him to levy upon the corn of appellee and enough other property to make the amount of the execution.

Over the objection and exception of appellant, appellee was permitted by the court to prove as part of the expense which appellee had incurred in defending against the collection of the \$1,055 judgment, that he had been thereby compelled to pay the \$256.21 court costs which had been occasioned thereby, but, in so ruling, we are of opinion the court committed an error, for the reason that in that case appellee admitted that he owed appellant a balance of \$300.70 on the notes upon which that judgment had been rendered, and claimed that he had tendered that amount, together with the costs up to the time of the tender, which appellant denied, and on the question of whether such tender had been made, appellee lost, and the costs, for that reason, were adjudged against him, and that adjudication is binding upon both appellee and appellant.

Appellant properly issued the landlord's warrant and had it levied on the corn which appellee had grown on the demised premises, for the rent was due and unpaid, and appellee's offer to pay such rent before the warrant was issued was accompanied with the condition that appellant should then deliver up the written lease between them, which was still in force, and would not expire until March 1, 1901.

And when the rent was unconditionally paid into court for appellant's use, he accepted it, and then voluntarily dismissed the distress proceeding.

A careful reading and consideration of all the evidence in this record has convinced us that the damages awarded to appellee in this cause are so much larger than appellant's offending warranted, even if he had offended as claimed, that it indicates that the jury were actuated either by passion or prejudice, or else did not exercise that reasonable judgment in arriving at their verdict that they should.

For the error indicated in admitting improper evidence, and for the reason that we consider the damages awarded excessive, we will reverse the judgment and remand the case so that another jury may pass upon the issues involved.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

FOURTH DISTRICT—FEBRUARY TERM, 1902.

**St. Louis, Vandalia & T. H. R. R. Co. et al. v. The Town
of Vandalia et al.**

1. **APPEALS**—*Lie from Interlocutory Orders Appointing a Receiver.*—Whenever an interlocutory order or decree is entered in a suit pending in any court of this state appointing a receiver or granting other or further powers to a receiver already appointed, an appeal may be taken from such order to the Appellate Court of the district wherein the court granting the order is situate.

2. **RECEIVERS**—*Appointment of, Ancillary.*—The appointment of a receiver is not the ultimate end and object of the suit, but is merely ancillary thereto, and rests in the sound discretion of the court; and the Appellate Court will not interfere with the course being pursued by the trial court except where it is clear the justice of the case requires it.

3. **SAME**—*Not to be Allowed to Commence Important Suits Without Specific Authority.*—A receiver ought not to be allowed to commence any important suit without direct and specific authority from the court.

Order Appointing a Receiver.—Appeal from the Circuit Court of Bond County; the Hon. BENJAMIN R. BURROUGHS, Judge presiding. Heard in this court at the February term, 1902. Reversed and remanded with directions. Opinion filed April 26, 1902.

JNO. G. WILLIAMS and T. J. GOLDEN, attorneys for appellants.

CHARLES W. THOMAS, attorney for appellees.

PER CURIAM.

The order appealed from in this case was entered by the

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Circuit Court of Bond County, in a chancery case therein pending, instituted by appellees, minority stockholders of appellant corporation, against appellant corporation and certain of its officers, directors and stockholders. No final decree has been entered in the case; but upon the coming in of the answers of the various defendants to the bill of complaint, and the producing of evidence *pro* and *con* as to certain issues raised in the pleadings, the court entered the following interlocutory order:

“First. That Henry C. Begole be appointed receiver in this cause of all and singular, the money, credits, rights, choses in action, records, books, papers and property of the St. Louis, Vandalia & Terre Haute Railroad Company (except its railroad and the equipment thereof), no matter where or in whose possession they or any of them may be.

Second. That said receiver be authorized and directed to collect, receive and reduce to possession all the said moneys, credits, choses in action, records, books, papers and property of said company above named, with the said exception, and to give proper receipts and acquittances for the same.

Third. That said receiver be authorized and directed to commence and prosecute in any and all proper jurisdictions, any suit or suits, action or actions, in his own name as such receiver, or in the name of the St. Louis, Vandalia & Terre Haute Railroad Company, which he may be advised are necessary to recover any sum or sums of money which the said company, through its officers, directors or stockholders has paid out or allowed to be retained by any person or corporation as compensation for any equipments or betterments put upon the railroad of said company since the 1st day of July, A. D. 1870, or to recover any and all sum or sums of money which said company has, through any of the agencies aforesaid, paid out, or allowed to be retained by any person or corporation as dividends upon any stock of said company designated and known as preferred stock.

Fourth. And the said receiver is authorized and directed to bring any suit or suits, action or actions, in any and all proper jurisdictions, in his own name as such receiver, or in the name of said company, which he may be advised are necessary and proper to cancel any bonded indebtedness of said company, or any part thereof, by causing to be set off against the same any or all of said dividends, if the said dividends have been received by any owner or holder of said bonded debt, and to take all steps and to do all things

which he may be advised are necessary or proper to restore to said company all the money due it from any source whatever, or to get a proper credit for the same upon its bonded debt.

Fifth. And the said receiver is authorized, if he be so advised, to bring, in his own name as such receiver, or in the name of the said St. Louis, Vandalia & Terre Haute Railroad Company, or in the name of any stockholder thereof who may consent to the same, any suit or suits, action or actions, which may be necessary to cancel any stock of said company, known and designated on its records as preferred stock, or to set aside and annul all and any preference or advantage which any stock of said company may have over any other stock thereof.

Sixth. And the said receiver is hereby authorized and directed to collect and receipt for all rentals due or to become due said company under and by virtue of the terms of the existing lease of its railroad to the Terre Haute and Indianapolis Railroad Company; and in his own name as such receiver, or in that of the St. Louis, Vandalia & Terre Haute Railroad Company, to commence and prosecute such suit or suits, action or actions, proceeding or proceedings, in any proper jurisdiction or court, as he may be advised are necessary to collect such rentals, or to forfeit such lease in case of their non-payment—and in case said lease is declared forfeited by the order, judgment or decree of any court, or the property in the said lease described is surrendered to said receiver, he shall operate the same by such servants, employes and agents as he shall deem necessary, until the further order of this court in the premises; and he shall apply to this court, at its first regular term after such forfeiture or surrender, for its further orders and directions in that behalf.

Seventh. And the said receiver is hereby empowered to employ any attorney or attorneys, agent or agents, solicitor or solicitors, which he may deem necessary, in order to enable him to execute this decree; and, subject to the orders of this court, to pay them out of any funds in his hands as such receiver, a reasonable compensation for any services they may render under their employment, and to pay out of said funds all the costs and necessary expenses, exclusive of counsel fees of any and all suits, actions or proceedings which he may bring or commence, or cause to be brought or commenced, under or by authority of this decree, and all the costs and charges of executing this decree; and the said receiver shall, on or before the second day of every

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term of this court, until his discharge or removal, render an itemized account of his receipts and expenditures as such receiver, and render to this court in writing a statement of all property in his hands as such receiver, and a report of the true condition of all matters and things hereby committed to his charge; and he shall keep correct books of account, which shall show all of his receipts and expenditures of money coming into his hands as such receiver, which books shall be subject at all reasonable times to the inspection of any party to this suit, or his or its agents thereunto authorized in writing.

Eighth. And the said receiver, when he has obtained possession of the books and papers of said company, shall bring them into the State of Illinois and keep them at its general office in the City of Greenville, in said State, subject to the inspection of any stockholder of said company, and subject to any proper use of the same which the directors and officers of said company may see fit to make at said office.

Ninth. And the said receiver shall, before entering upon the duties of his trust, as prescribed by this decree, enter into a bond in the penal sum of five hundred thousand dollars (\$500,000) with the parties to this suit as obligees, with good and sufficient sureties to be approved by the clerk of this court, and conditioned to the effect that if he, the said Henry C. Begole, as such receiver, shall faithfully account for and pay over all money and deliver all other property which may come into his hands as such receiver, as ordered and directed by this court, and shall faithfully comply with the orders and decrees of this court made and entered, or to be made and entered in this cause, then the obligation of said bond to be void; and when said bond is approved by the said clerk and filed in his office, the said receiver shall enter upon the duties of his said trust.

Tenth. It is further ordered, adjudged and decreed by the court that any party to this suit who has in his possession or in his charge, or under his control, any money, books, papers, or other property of the said St. Louis, Vandalia & Terre Haute Railroad Company, shall turn the same over to said receiver, as soon as he has qualified as hereinbefore directed, and the said company and all of its officers, directors and agents, and their successors, and all of the parties defendant to this suit, are hereby enjoined and restrained from in any manner delaying, harassing, obstructing or impeding the said receiver in the discharge of any of his duties hereunder.

Eleventh. It is further ordered, adjudged and decreed by the court that any person or corporation having any claim or demand upon or against the said St. Louis, Vandalia & Terre Haute Railroad Company, or against any fund which may at any time be in the hands of said receiver, may intervene in this case and present the same to this court for allowance or disallowance, as the case may be, and leave is given to the complainants or defendants to file a certificate of evidence in this cause during the present term of this court, and this cause is continued for such further orders and decrees as the facts of this case may warrant and as to equity may seem meet and proper."

Appellants' counsel contend that the order appealed from is a final decree in the case and their able and extended brief and argument proceeds in the main upon that theory. In this we can not agree with counsel. It does not purport to be a final decree and is not such decree in either its scope or character. It is interlocutory merely. It is, however, such an order as may be appealed from. The statute of 1887, Hurd's Revision of 1901, Chap. 22, Sec. 52, provides:

"That whenever an interlocutory order or decree is entered in any suit pending in any court in this State, granting an injunction, or overruling a motion to dissolve the same, or enlarging the scope of an injunction order, or appointing a receiver, or granting other or further powers or property to a receiver already appointed, an appeal may be taken from such interlocutory order or decree to the Appellate Court of the district wherein is situated the court granting such interlocutory order or decree: Provided, that such appeal is taken within thirty days from the entry of such interlocutory order or decree and is perfected in said Appellate Court within sixty days from the entry of such order or decree. * * * Upon filing of the record in the Appellate Court, the same shall be at once docketed, and shall be ready for hearing under the rules of said court, taking precedence of other cases in said court. Upon such appeal, the Appellate Court may affirm, modify or reverse such interlocutory order or decree, and shall direct such proceedings to be had in the court below as the justice of the case may require."

The requirements of this statute have been complied with by appellants and the case is properly before us for determination. It must be borne in mind that the appointment

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of a receiver is not the ultimate end and object of this suit, but is merely ancillary thereto, and rests in the sound discretion of the court. In such cases appellate courts will not interfere with the course being pursued by the trial court, except where it is clear that the justice of the case requires it.

The abstract of the pleadings in this case covers over 400 closely printed pages. Time and space at our disposal will not permit of any attempt to state even the substance of them in this opinion. The record discloses that many of the charges made by complainants as to the management of the property of the corporation and the disposition of its funds are probably true, and that appellants have not in the past acted with due regard to the interest of the minority stockholders, and that there is no probability they will during the future progress of the pending litigation act otherwise than as they have in the past, if left by the court in control of the property, funds and income of the corporation. We are therefore of opinion that the Circuit Court did not abuse its power in the fact of appointing a receiver as a means of placing the property, funds and income of the corporation under the control of the court, that further probable misapplication and waste may be stayed pending what promises to be protracted litigation. But we are also of opinion that the powers given to the receiver by the terms of the order are excessive, and might be so exercised as to work great injustice. The order as it now stands gives the receiver power to institute suits and incur expense without limit; to enter of his own will upon a course of litigation that might be most unwise and wasteful. The receiver ought not to be allowed to commence any important suit without direct and specific authority from the court. He can during the litigation now pending receive and hold the property, funds and income, so that the court may protect the interests of all in future dispositions of it, and if the court shall in any particular case or cases, after due investigation, deem it prudent and just that suits be instituted, the receiver can be so directed.

The order of the Circuit Court appealed from is affirmed

in part, reversed in part, and modified so as to read as follows:

“First. That Henry C. Begole be appointed receiver in this cause of all and singular the money, credits, rights, choses in action, records, books, papers and property of the St. Louis, Vandalia & Terre Haute Railroad Company, except its railroad and the equipment thereof, no matter where or in whose possession they or any of them may be.

Second. That said receiver be authorized and directed to collect, receive and reduce to possession all the said moneys, credits, choses in action, records, books, papers and property of said company above named, with the said exception, and to give proper receipts and acquittances for the same.

Third. And the said receiver is hereby authorized and directed to collect and receipt for all rentals due or to become due said company under and by virtue of the terms of the existing lease of its railroad to the Terre Haute & Indianapolis Railroad Company; and in his own name, as such receiver, or in that of the St. Louis, Vandalia & Terre Haute Railroad Company, to commence and prosecute such suit or suits, action or actions, proceeding or proceedings, in any proper jurisdiction or court, as he may be advised are necessary to collect such rentals, or to forfeit such lease in case of their non-payment; but said receiver shall not commence or prosecute any suit or suits, action or actions, proceeding or proceedings, except for the recovery and collection of the rentals above specified, without leave of court so to do first had and obtained; and in case said lease is declared forfeited by the order, judgment or decree of any court, or the property in the said lease described is surrendered to said receiver, he shall operate the same by such servants, employes and agents as he shall deem necessary until the further order of this court in the premises; and he shall apply to this court at its first regular term after such forfeiture or surrender, for its further order and directions in that behalf.

Fourth. And the said receiver shall, before entering upon the duties of his trust as prescribed by this decree, enter into a bond in the penal sum of five hundred thousand dollars (\$500,000) with the parties to this suit as obligees, with good and sufficient sureties to be approved by the clerk of this court, and conditioned to the effect that if he, the said Henry C. Begole, as such receiver, shall faithfully account for and pay over all money and deliver all other property which may come into his hands as such

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receiver, as ordered and directed by this court, and shall faithfully comply with the orders and decrees of this court made and entered or to be made and entered in this cause, then the obligation of said bond to be void; and when said bond is approved by said clerk and filed in his office, the said receiver shall enter upon the duties of his said trust.

Fifth. And the said receiver, when he has obtained possession of the books and papers of said company, shall bring them into the State of Illinois, and keep them at its general office, in the city of Greenville, in the said state, subject to the inspection of any stockholder of said company, and subject to any proper use of the same which the directors and officers of said company may see fit to make at said office.

Sixth. It is further ordered, adjudged and decreed by the court that any party to this suit who has in his possession or in his charge or under his control any money, books, papers or other property of the said St. Louis, Vandalia & Terre Haute Railroad Company, shall turn the same over to said receiver, as soon as he has qualified as hereinbefore directed; and the said company, and all of its officers, directors and agents, and their successors, and all of the parties defendant to this suit, are hereby enjoined and restrained from in any manner delaying, harassing, obstructing or impeding the said receiver in the discharge of any of his duties hereunder.

Seventh. It is further ordered, adjudged and decreed by the court that any person or corporation having any claim or demand upon or against the said St. Louis, Vandalia & Terre Haute Railroad Company, or against any fund which may at any time be in the hands of said receiver, may intervene in this case and present the same to this court.

Eighth. The said receiver shall, on or before the second day of each and every term of this court, render an itemized account of his receipts and expenditures, and a true statement of all property in his hands as such receiver, and report the true condition of all matters and things hereby committed to his charge. And he shall be allowed from time to time such credits for disbursements and necessary expenses and such reasonable compensation for his services as the court may approve and order."

This cause is remanded to the Circuit Court of Bond County, with directions to that court to enter the above modified order in said cause for and in lieu of the said order appealed from. Remanded.

Mobile & Ohio R. R. Co. v. Michael R. Dugan.

1. **RAILROADS**—*Failure to Give Statutory Signals*.—The failure on the part of a railroad to give the statutory signals when approaching a crossing is *prima facie* evidence of negligence.

Action on the Case, for damages caused by collision with locomotive. Appeal from the Circuit Court of Monroe County; the Hon. MARTIN W. SCHAEFER, Judge presiding. Heard in this court at the February term, 1902. Affirmed. Opinion filed September 11, 1902.

LANDSDEN & LEEK, attorneys for appellant.

JOSEPH W. RICKERT and WILLIAM WINKELMAN, attorneys for appellee.

MR. JUSTICE WORTHINGTON delivered the opinion of the court.

Suit to recover damages to traction engine and separator, resulting from a collision with appellant's train at a road crossing. Verdict and judgment for appellee for \$975, from which defendant appealed.

The only questions presented in appellant's brief are questions of fact. They are, in substance, was appellant negligent; if so, was appellee guilty of contributory negligence; and are the damages excessive.

It would serve no useful purpose to repeat and analyze in detail the evidence upon these points. It may be summarized as follows: The train approached from a reverse curve, and could be seen approaching from the crossing for sixty-four rods. There is a conflict in the evidence as to whether the bell was rung or the whistle sounded, as the statute requires, eighty rods from the crossing. The evidence that the statute in this respect was not complied with, was ample to warrant the jury in so finding. It is a case where, the curve in the track preventing the approach of the train from being seen for more than sixty-four rods, it was most important that the statutory signals should be given. If they were not given, it was *prima facie* evidence of negligence on the part of appellants. R. R. I. & St. L.

R. R. Co. v. Hillmer, 72 Ill. 240; T. H. & I. R. R. Co. v. Voelker, 129 Ill. 555; L. S. & M. S. Ry. Co. v. Parker, 131 Ill. 566; B. & O. S. W. Ry. Co. v. Wetmore, 65 Ill. App. 292; Morris v. Stanfield, 81 Ill. App. 264.

The evidence discloses that Cody, one of appellee's men, went on the crossing seventy-five or eighty yards in advance of the traction engine, and looked to see if any train was approaching. Seeing none, he signaled to appellee to come ahead, which he did. Appellee testifies that he looked up the track, before we started on, and saw no train. That he then started across, and got about half way over when the collision occurred. He is corroborated by other witnesses.

We think the jury was warranted in saying that appellee was in the exercise of ordinary care. If so, he was not guilty of contributory negligence.

Four witnesses testified as to the amount of damages, one of them a practical machinist, who was experienced in repairing threshers. They estimated the damages as from \$950 to \$1,000. One witness testified for appellant, also a practical machinist and repairer of engines and threshers, who estimated the damages at \$321.20, and who stated he would contract to repair the engine and separator for that amount.

It was for the jury to fix the damages from this evidence. They saw and heard the witnesses and we are not warranted, under the evidence, in saying that their finding is incorrect.

Judgment affirmed.

D. M. Osborne & Co. v. Gaar, Scott & Co.

1. **PLEADINGS—How Construed.**—It is the duty of the court to construe the pleadings most strongly against the pleader.

Assumpsit, upon a promissory note. Error to the Circuit Court of Jasper County; the Hon. SAMUEL L. DWIGHT, Judge presiding. Heard in this court at the February term, 1902. Affirmed. Opinion filed September 11, 1902.

D. M. Osborne & Co. v. Gaar, Scott & Co.

GIBSON & JOHNSON, attorneys for plaintiffs in error.

GEO. W. FITHIAN, R. J. KASSERMAN and SIDNEY B. FITHIAN,
attorneys for defendants in error.

MR. JUSTICE CREIGHTON delivered the opinion of the court.

This was a declaration in assumpsit, in the Circuit Court of Jasper County, by plaintiffs in error against defendants in error. The Circuit Court sustained a demurrer to the declaration. Plaintiffs in error excepted and elected to stand by their declaration, and thereupon the court rendered judgment in favor of defendants in error for costs.

The declaration avers, in substance, that one Bohanan, being indebted to defendants in error in the sum of \$550, evidenced by promissory notes bearing interest at the rate of seven per cent per annum, to secure the same, duly executed to them a chattel mortgage upon certain personal property of the value of \$1,000; that thereafter and before the maturity of the indebtedness so secured to defendants in error, plaintiffs in error obtained a judgment against Bohanan for \$89.40, with costs to the amount of \$11.75, and to satisfy the same, levied upon and sold the property that Bohanan had mortgaged to defendants in error, plaintiffs in error being the purchasers at such sale and receiving possession of the property by virtue thereof and thereby becoming the owners of it, subject to the mortgage and rights of defendants in error thereunder; that upon the maturity of the indebtedness so secured to defendants in error they seized the mortgaged property in foreclosure, it being then of the value of \$1,000, proceeded to sell the same at public sale, and at such sale became the purchasers of all of said property at a nominal price, and thereupon converted it to their own use.

It was the duty of the trial court and is the duty of this court to construe the declaration most strongly against the pleaders. At this stage of pleading and in the state of record here, no intendments or presumptions can be indulged in favor of the declaration. Plaintiffs in error do not claim to have other or greater rights than had Bohanan,

the mortgagor. The full extent of their claim is that they succeeded to his rights. Bohanan's rights were dependent upon the terms and provisions of the mortgage, and as to these the declaration is absolutely silent.

The judgment of the Circuit Court is affirmed.

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Nelson Field v. Chas. W. Eilers et al.

1. **PARTNERSHIP—Defined.**—A partnership has been defined to be "The contract relation subsisting between persons who have combined their property, labor or skill, in an enterprise or business as principals for joint profit." 1 Bates on Partnership, Sec. 1.

2. **SAME—Goods Sold in Name of One Party.**—The fact that one party sold the goods in his own name, together with the inference that the proceeds were transmitted to him in his own name, does not necessarily rebut the idea of a partnership, because if a partnership exists, the fact that one partner by contract with his copartner is to have the control of the product for sale, will not prevent it being such.

Assumpsit.—Appeal from the Circuit Court of Effingham County; the Hon. TRUMAN E. AMES, Judge presiding. Heard in this court at the February term, 1902. Reversed and remanded. Opinion filed September 11, 1902.

S. F. GILMORE and WOOD BROS., attorneys for appellant.

E. A. RICHARDSON and E. N. RINEHART, attorneys for appellees.

MR. PRESIDING JUSTICE BIGELOW delivered the opinion of the court.

This is an action of assumpsit, brought by appellant against appellees, as copartners, to recover the sum of \$339.85.

Appellee Dazey filed a sworn plea denying the existence of the partnership. At the close of appellant's evidence, the court, at the instance of appellee Dazey, instructed the jury to find the issues in his favor.

This ruling of the court presents substantially all there is of the case, of which complaint is made.

Field v. Eilers.

Appellee Dazey was cashier of the Merchants & Farmers Bank, in the village of Findlay, in this State. Appellee Chas. Eilers bought hogs at the town of Dieterich, not far distant from Findlay. Dazey furnished the money, and Eilers did the buying. The hogs were shipped to various points but always in the name of Dazey. On one occasion Dazey accompanied Eilers to Chicago to dispose of some hogs, which had been brought. Eilers would pay for the hogs which he bought, by drawing checks in his own name on the Merchants & Farmers Bank of Findlay. At times when he ran out of checks on that bank, he would ask appellant, who is his father-in-law, to advance the money, and then Eilers would draw a check or checks on the Merchants and Farmers Bank, to repay appellant. At different times in March and June, 1901, when most of the transactions took place, the bank repaid appellant something over \$1,500 which had been advanced by him to Eilers, in the purchase of hogs. During all of that time, Dazey was cashier of the bank. The claim in suit is partly for money advanced at Eilers' request in buying hogs, and partly for stock sold to him, the money advanced and stock sold being, as claimed by appellant, partnership transactions of Dazey and Eilers.

Neither Dazey nor Eilers testified on the trial, so that as to the real arrangement between them in the business done at Dieterich station, the court received no light from those who knew best about the matter. The case is further accentuated by doubt on account of the imperfect manner in which appellant presented what evidence he had.

On the 19th of January, 1901, Dazey wrote Eilers to buy hogs, stating the price at which he was to buy, also directing him to go south and buy as many hogs as he could get hold of, if he bought them cheap. On the 2d of February, 1901, Dazey wrote from Cleveland, Ohio, to Eilers, to buy a load of hogs, directing how and where to ship them, telling him the state of the market, at what prices hogs would make money, and cautioning Eilers about weights. On the 24th of February of the same year, Dazey wrote to Eilers

not to ship such light loads of hogs, if he wanted to make money on them; telling him what the loss would be on the car; directing him to buy only one load of hogs as high as five cents "till we see how the market is;" asserting as a fact light hogs bring ten cents more per cwt. than heavy ones. Three telegrams were offered in evidence by appellant, one from Eilers to Dazey, and two from Dazey to Eilers. Appellee Dazey objected to them, no reason for the objection being given, so far as the abstract shows, and the court sustained the objection. The telegrams from Dazey related to the purchase of hogs; the one from Eilers, to the purchase of corn.

The postmaster at Dieterich, appellee Dazey making no objection to the evidence, testified that letters and stock journals came repeatedly to his office addressed to "Dazey & Eilers."

A witness who was connected with a bank which Dazey opened in Dieterich, asked Dazey what understanding he had with Eilers with reference to stock that was being shipped from Dieterich, and Dazey replied that there was no understanding, no contract. Appellant also testified that he had a conversation with Dazey on the 8th of July, in which he said to Dazey, "You appear to be taking in a lot of stock to-day." To which he replied, "Yes, we are taking in a lot of nice stock. We are going to ship seven cars this evening." The evidence also shows that Dazey accompanied this shipment of stock to Chicago, where it was sold.

The court having taken the case from the jury, all this evidence and all it tends to prove, must be taken to be conclusively true.

A partnership has been defined to be, "The contract relation subsisting between persons who have combined their property, labor or skill, in an enterprise or business, as principals for joint profit." 1 Bates on Partnership, Sec. 1. That appellee Dazey was interested in the purchase of hogs in some way, either as sole principal or jointly with Eilers, there can be little doubt from the evidence.

Field v. Eilers.

Whether the matters stated in the letters were by way of disinterested advice, or by reason of a pecuniary interest, was a question of fact for the jury; and whether the pecuniary interest was by reason of the fact that Dazey bought the hogs for himself through Eilers, or because he was jointly interested with Eilers, or because Eilers was using Dazey's money and so the latter had the interest of a creditor in what Dazey did, all such matters, by reason of the ambiguity of the language and the acts proven to have been done by Dazey, were proper matters for the consideration of the jury. The language used by Dazey, and the acts proven to have been done by him, were not of the definite character that the court could say, as a matter of law, that Dazey was not a partner with Eilers. The joint "enterprise" of Dazey and Eilers could certainly be inferred by a jury from the evidence as it stood, for Dazey furnished the money and Eilers furnished the labor in the purchase of the hogs. And if there was no understanding between Dazey and Eilers as to the hogs shipped, a jury would have the right to draw the conclusion that they were interested in the "joint profits" of the business; Eilers was probably not buying hogs for the love of physical exercise or for mere mental training. And, if they were interested in the joint profits, the jury would also be authorized to find, that although there was no understanding between them, a "community of interest" existed in the hogs. *Fougner v. First National Bank of Chicago*, 141 Ill. 124; *State Nat. Bank v. Butler*, 149 Ill. 575.

The fact that Dazey sold the hogs in his own name, together with the inference that the proceeds were transmitted to him in his own name, does not necessarily rebut the idea of a partnership, because if a partnership exists, the fact that one partner by contract with his copartner is to have the control of the product for sale will not prevent it being such. 1 *Bates on Partnership*, section 39, citing *Meador v. Hughes*, 14 Bush, 652.

In relation to the telegrams offered, both the proofs and the objections thereto, are of such indefinite character that

we can not pass on the questions sought to be presented. It is not shown whether they are originals, as written by the senders, or whether they are the messages as received at the places to which they were sent, or whether they are letter-press copies or other kinds of copies. It is a familiar rule of law that he who alleges error in the trial court's rulings must show such fact. We are unable to say whether the court was right or wrong in refusing to admit this evidence.

We are of the opinion that there was evidence tending to show the existence of a partnership, and that appellee Dazey should have been put to his proof to negative the evidence which was in, with all of the legitimate inferences that a jury could draw therefrom. It is true the evidence is ambiguous as to the relations which existed between Dazey and Eilers. That it shows some kind of a relation, either of debtor and creditor, employer and employe, or principals with equal powers, is certain beyond question; but what that relation is, is a question of fact to be determined by a jury upon proper instructions.

The Circuit Court erred in taking the case from the jury, and for this error the judgment of the court is reversed and the cause remanded for a new trial.

The City of Alton v. Z. B. Job, Jr., John Patterson and Others, Partners in Business under the Firm Name and Style of "Job & Company."

1. ORDINANCES—*For Improvements to be Paid for by Special Tax.*—An ordinance is the very foundation of the improvement when it is to be paid for by a special tax, and no special tax can be levied to pay for improvements already made.

Assumpsit, on a paving contract. Appeal from the Circuit Court of Madison County; the Hon. MARTIN W. SCHAEFER, Judge presiding. Heard in this court at the February term, 1902. Affirmed. Opinion filed September 11, 1902.

B. J. O'NEILL, attorney for appellant.

City of Alton v. Job.

HENRY S. BAKER, attorney for appellees.

Where an improvement ordinance, under which a special tax is to be levied, has been declared void, and is a nullity, it is and ever will be impossible to levy a valid special tax, and the contractor will have a right of action against the city for an unpaid balance due him. *Maher v. The City of Chicago*, 38 Ill. 266; *City of Chicago v. People ex rel. Hiram Norton*, 56 Ill. 327; *Foster v. The City of Alton*, 173 Ill. 587; *Markley v. The City of Chicago*, 190 Ill. 276.

MR. PRESIDING JUSTICE BIGELOW delivered the opinion of the court.

This is an action of assumpsit brought by appellee against appellant to recover the sum of \$416, due from appellant to appellee for paving streets, etc. Appellant demurred to the declaration; the court overruled the demurrer, and, by virtue of a stipulation between the parties, the court rendered judgment against the city for the amount claimed in the declaration. The case is before us on an appeal by the city.

No assignment of errors appears in the abstract, but the point argued by appellant's counsel relates solely to the order overruling the demurrer.

On the 10th of March, 1896, the city of Alton passed an ordinance providing for the paving of Piasa street, the City Hall square, a portion of Market street, and a distance of seven blocks of Front street, the work to be paid for by special taxes, on property benefited by the improvement.

On the 7th of September, 1896, the city contracted with appellees for the construction of this improvement, except the Front street part of the work. The contract provided that appellees should make no claim against the city, except for the special taxes levied against the property benefited by the improvement; and it was further provided by the contract that the city should use all efforts to collect the special taxes without cost to appellees, and that, if the ordinance under which the tax was levied should be declared invalid by the decision of the courts, the city

should take all necessary steps to correct it and to collect the taxes.

At the time the contract was entered into the city had filed a petition, under article 9 of the city and village act, as it existed prior to the act of 1897, in the County Court of Madison County, for the confirmation of the special tax; objections had been filed against the confirmation, and the matter was pending in the County Court at that time. On the 10th of November, 1896, while the work of paving was under way, the city passed another ordinance by which the Cleveland, Cincinnati, Chicago & St. Louis Railway Company obligated itself, in consideration of certain privileges granted it by the city, to pave practically the same part of Front street which was included in the ordinance of March 10th of that year, but not included in the contract with appellees, the paving to be done by the railway company to be thirty feet in width instead of thirty-six feet, as was provided by the first ordinance. The railway company did the paving or paid the cost of it. Certain owners of property fronting on Piasa street and Public Hall square, being part of the pavement which appellees constructed, under their contract, filed objections, as heretofore stated; the County Court of Madison County confirmed the assessment, and the objectors appealed the case to the Supreme Court, where the judgment of confirmation of the County Court was reversed, on the 19th of October, 1900, without a remanding order. *McPike v. City of Alton*, 187 Ill. 62.

Appellees furnished the materials and did the work called for by their contract, and finished it to the satisfaction of the city. On the 4th of March, 1901, appellees brought the present suit, claiming a balance due from the city of \$416, alleging that by reason of the fact that the ordinance of March 10, 1896, was null and void, the city was unable to collect the special tax to pay that amount, and that, under such state of facts, the city is liable. The declaration contains no allegation that appellees have ever asked appellant to make a re-assessment or that appellant has refused to do so.

On behalf of appellant it is contended that the ordi-

nance of March 10, 1896, under which the work was done, was a valid ordinance, when the contract was entered into, and that the contract itself is free from legal objection; that therefore there can be no liability on the part of the city, until a supplemental assessment has been made, as provided in the 46th section of the city and village act, as it stood prior to 1897. In support of this contention appellant cites Freeport Street Railway Co. v. City of Freeport, 151 Ill. 451, and Foster v. City of Alton, 173 Ill. 587. Appellant also asserts that the city may be compelled by mandamus to make such re-assessment, if it should refuse. The People ex rel. v. The City of Pontiac, 185 Ill. 437. On behalf of appellees, it is contended that there can be no re-assessment under that ordinance, because it is absolutely null and void, and in support of that position, reliance is placed upon what the Supreme Court decided in McPike v. City of Alton, 187 Ill. 62.

We are unable to adopt the views of appellant. The ground of the decision in the McPike case, where this same ordinance was under consideration, was that the ordinance of March, 1896, was repealed by the ordinance of November 10th of that year; that the improvement provided by the first ordinance was an entirety. It is fairly inferable from the allegations in the declaration (though it is not altogether distinct in that regard), that the ordinance was repealed while the work was in progress. Such being the fact, the matter is left in the same position as if no ordinance had ever been passed, and it has been held a number of times that an ordinance is the very foundation of the improvement, when it is to be paid for by a special tax. St. John v. City of East St. Louis, 136 Ill. 207; City of Carlyle v. County of Clinton, 140 Ill. 512; City of East St. Louis v. Albrecht, 150 Ill. 506; The Connecticut Mutual Life Insurance Co. v. City of Chicago, 185 Ill. 148. There is in this case no ordinance which can be amended; or if it should be conceded that the ordinance of March 10th is in force *pro hac vice*, notwithstanding its repeal, an amendment to such ordinance would either have to tacitly recognize the Front street paving as being still a part of the

improvement, or it would have to expressly designate the improvement as containing Piasa street, City Hall square, and Market street only. In the first view, a re-assessment would meet the same successful objections which were interposed in the McPike case; and in the latter view the re-assessment would be for a different improvement than was established by the ordinance sought to be amended.

The difficulty is, not that the ordinance is in any respect invalid, but that it does not legally exist; to amend it, without providing for the Front street pavement, and this is the only way it can be done at all, is in fact to pass an original ordinance for another and different improvement than that of Piasa street, Public Hall square and Market street; but this improvement is already constructed, and the warrant for the special tax would be an ordinance passed long after the work was completed. The decisions above cited are explicit, that no special tax can be levied to pay for improvements already made.

The judgment of the Circuit Court overruling the demurrer to the declaration and in rendering judgment for the amount admitted by appellant to be due, is affirmed.

John H. Jones, Trustee, for the Use of Jonathan R. LeValley, etc., v. John P. Jones et al.

1. **GAMBLING CONTRACTS—*Buying on Margins.***—In order to invalidate the contract for the delivery of property in the future, it must appear that neither party had the intention to deliver the property, and that both parties had the intention of settling the differences only. But the intention of the parties in this regard may be established, not merely by their assertions, but by all of the attending circumstances of the transaction. It makes no difference whether the real intention is formally expressed in words or not, if the facts and circumstances in proof show that it was the real understanding that there should be no actual purchase and no delivery or acceptance of the property involved in the contract, but merely an adjustment of damages upon differences.

Bill to Foreclose a Trust Deed.—Appeal from the Circuit Court of Jefferson County; the Hon. EDMUND D. YOUNGBLOOD, Judge presiding. Heard in this court at the February term, 1902. Affirmed. Opinion filed September 11, 1902.

Jones v. Jones.

On the 14th day of November, 1893, appellee John P. Jones and Gomer D. Jones, his son, executed their promissory note to appellant, Jonathan R. LeValley, for \$1,600, payable one year after its date, with interest at six per cent.

On the same date, Gomer D. Jones executed a trust deed by which he conveyed to John H. Jones forty acres of land in Jefferson county, to secure the payment of the note. The deed was duly recorded. The claimed debt for which the note was given, arose out of transactions between appellant, LeValley, and John P. Jones, concerning the purchase and sale, or pretended purchase and sale, of grain by appellant, LeValley, on the board of trade of Chicago, on account of appellee John P. Jones.

Some years after the note and trust deed were made, Gomer D. Jones died intestate, unmarried and without issue, and appellees are his legal heirs.

This suit is a bill in chancery, brought by appellant against appellees, to foreclose the trust deed.

Appellees filed a verified plea to the bill, alleging that the note and trust deed were executed by Gomer D. Jones; that the note was executed by appellee John P. Jones, in settlement and for the purpose of securing the payment of a gambling debt then claimed to be due and owing by him to appellant, LeValley, a debt resulting from deals in "wheat options" or "futures" made by and between the defendant, John P. Jones, and said Jonathan R. LeValley, in which no wheat was actually bought or sold, and none was intended to be bought or sold, such deals being in contravention of the statute in such case made and provided, and the said note and mortgage were not given "for any good or valuable consideration, and are by law null and void."

Appellees followed their plea with a cross-bill, setting up the due execution of the note and trust deed; the recording of the deed; that appellees are in possession of the land by appellee John P. Jones, agent for the other appellees; and further setting up the substantive matter of the plea, praying that on a final hearing, the note and trust deed be

decreed to be null and void, and that they be delivered up and canceled and the orator's title to the land be quieted and freed from the lien of the trust deed.

Appellant answered the cross-bill, denying its principal charges, and the cause was heard on the original bill; appellees' plea; the replication thereto; the cross-bill; answer to it; replication to answer; depositions of witnesses filed in the case; stipulations of the parties and oral evidence heard by the court; and the court dismissed the original bill and granted the relief prayed for in the cross-bill, and the case comes here on the appeal of the complainant in the original bill.

OTIS H. WALDO and NORMAN H. MOSS, attorneys for appellant.

ALBERT WATSON, attorney for appellees.

MR. PRESIDING JUSTICE BIGELOW delivered the opinion of the court.

Counsel for appellant, after stating the case as they understand it, say :

"The rulings of said Circuit Court which are particularly complained of by appellant, are as follows :

1st. The Circuit Court permitted said John P. Jones to testify, over objection, what his intention or expectation was in the above transactions, and also as to what property or money or means he had.

2d. The Circuit Court found that the dealings on the board of trade of the city of Chicago, out of which the indebtedness arose, were a form of gambling contracts prohibited by law.

3d. The Circuit Court entered a decree dismissing the original bill for want of equity.

4th. The Circuit Court entered a decree in accordance with the prayer of the cross-bill."

In these complaints counsel have stated all that is embraced in the latter seven of the nine errors assigned on the record, hence it will not be necessary to make special reference to them.

The first two errors assigned, question the rulings of the court in admitting on the hearing, improper, and refusing

to admit proper evidence, to which rulings appellant excepted, but since they are not referred to in appellant's brief and argument, we need not notice them, even if it should be conceded that exceptions to the rulings of the chancellor in admitting and excluding evidence in a chancery case tried by him without a jury can be assigned for error. The only questions then, to be determined, are questions of fact, viz., did appellant, at the time he made the claimed sales of grain to appellee John B. Jones, intend to deliver the grain to Jones or to his order, in the event that the price of grain advanced in the Chicago market, or did he expect and intend to settle with Jones by paying him in money the difference between the contract price of the grain, and the market price of it, at the time named for its delivery? And on the other hand, if the price of grain declined in the market, did appellee John P. Jones expect and intend to receive the grain and pay the contract price for it, or did he intend and expect to settle with appellee by paying him in money the difference between the contract price of the grain and the market price of it, at the agreed time of delivery?

Appellant has answered the first question in his testimony, according to his interest, as determined by events happening subsequent to the deals; and appellee John P. Jones has answered the second question in his testimony, according to his interest, as determined by events likewise happening subsequent to the deals, and it can not be said that the weight of the testimony of one as to his intention preponderates over that of the other; it therefore becomes necessary to determine from the other evidence in the case, what the real intention of the parties was in making the deals.

It appears from the undisputed evidence that appellee John P. Jones was a mason and contractor and that appellant, LeValley, was a commission broker on the board of trade in Chicago. That some time before the execution of the trust deed sought to be foreclosed in this case, Jones was engaged by LeValley to build him a house in Chicago,

and by this means they became acquainted and talked about the matter of speculating in grain on the board of trade. And it further appears that although Jones by trade was a mason and contracted to erect stone buildings, and had saved a little money at his trade, he was nevertheless visionary as to some matters disconnected with his trade, and to forward these matters he took counsel with LeValley as to making money by dealing on the board of trade, with which business he was not familiar. He put up money for margins and some of the first deals or pretended deals, apparently made for him a few small sums, which were paid to him by LeValley. His first deals seem to have been in corn, but afterward, and before the execution of the note and trust deed, the deals seem to have been in wheat only, and these purchases were in 5,000 to 10,000 bushel lots. He was frequently called upon by LeValley to put up margins, and he did so as long as his money lasted, and he even borrowed money for that purpose.

Jones was an old man, between seventy and eighty years of age, and was evidently unfit for doing business in buying and selling grain on the Chicago market, and because of the friendship and intimacy apparently existing between the two men, it seems incredible that LeValley did not know that Jones was not really purchasing any wheat, and had no money to pay for it with. To say, as LeValley does in his testimony, that he did not know that Jones' intentions were that the deals should be settled by the payment of differences in money, and he, LeValley, did not intend to close the deals in that way, taxed the credulity of the chancellor, who tried the case below, too strongly for him to accept such an explanation as satisfactory, that the deals were straight sales and purchases of grain, free from intent to disobey or evade the law.

If appellant actually purchased any wheat for Jones in the open market, it would seem that he would know from whom the purchases were made, and the same can be said of the sales, if any there really were; but the evidence gives no light on these points, notwithstanding appellant

was fully advised before the trial of the case, by appellees' pleadings, what their defense to appellant's bill was, and if there was any written evidence, showing from whom any purchases were made, or to whom any sales were made, it seems to us appellant would have produced it or given some reason for not doing so; but he did neither, and seems to have relied on the fact that he was a licensed broker on the board of trade, and that as the rules of that corporation prohibited the dealing in options, therefore his dealings with Jones were regular commercial transactions. Such a conclusion would preclude the idea that members of the board of trade could gamble on the prices of grain, notwithstanding appellant has proven by expert members of the board, that ninety to ninety-five per cent of the transactions on the board of trade are not settled by the delivery of the commodity dealt in. While we do not agree with the construction put upon this testimony by counsel for appellees, that ninety per cent of the deals on the board of trade are not enforceable under the laws of this state, for evidently the witnesses did not mean to be so understood, yet a fair inference from their testimony is, that many of the purported deals are not within the true spirit of the law, even if the forms of the law and of the rules of the board of trade have been complied with. We think it probable that appellant, in his dealings with Jones, came to believe he was within the rule of the law, not only in taking all of Jones' money, but also in getting security for \$1,600, which he claims Jones owed him, as the result of lawful and businesslike transactions between them. So thought the appellants in the case of Jamieson et al. v. Wallace, 167 Ill. 388, which in principle is very like this case. The difference between that case and this is, in that case the appellee was a woman and the stuff claimed to have been purchased by Jamieson and his copartners, was gas and railroad stocks. Mrs. Wallace's capital was about \$7,500. The stocks claimed to have been purchased for her amounted to \$17,500. In this case Jones' capital is left uncertain by the evidence, but we glean from the evidence it might have been

\$1,500. He was evidently a weak old man, when in the autumn of 1893 LeValley claims to have purchased for him 10,000 bushels of wheat for following May delivery at 71½ cents per bushel, and it is claimed by appellant that this wheat was sold by Jones' direction on March 28, 1894, at 61½ cents per bushel, yielding (including commissions) a net loss of \$1,000 on the deal. This sum, with other like indebtedness, constitutes the sum secured by the trust deed.

In delivering the opinion of the court in the case of Jamieson et al. v. Wallace, *supra*, Mr. Justice Magruder said:

"In order to invalidate the contract, it must appear that neither party has the intention to deliver the property, and that both parties have the intention of settling the differences only. But the intention of the parties in this regard may be established, not merely by their assertions, but by all of the attending circumstances of the transaction. The question of intention is a question for the jury or for the court, to be determined by a consideration of all the evidence. The intention of the parties in such cases may be determined from the nature of the transaction, and from the manner and method of carrying on the business."

The court cites many authorities in support of its view of the matter, which need not be repeated here. The court further says:

"Among these circumstances, besides the mode of dealing between the parties, is the pecuniary ability of the party purchasing. If the purchases of a party as ordered through a broker, are larger in amount than he is able to pay for, it is a strong circumstance indicating that there was no intention of receiving the property, but rather an intention to settle the difference between the market price and the contract price. Such intention may be also inferred where the party making the purchase never calls upon the party ordering the purchase for the purchase money, but only for margins. It makes no difference whether the real intention is formally expressed in words or not, if the facts and circumstances in proof show that it was the real understanding that there should be no actual purchase and no delivery or acceptance of the property involved in the contract, but merely an adjustment of damages upon differences."

There were a number of deals between appellant and Jones, and in no instance was there any actual delivery of the grain supposed to have been purchased by him, nor did he call for any delivery; but, on the other hand, there was no lack of calls by appellant for margins, and Jones seems to have paid them until his money was exhausted, but one call too many was made. About the time of the last claimed purchase of wheat, appellant sent one Baldwin, his bookkeeper, to Jones' residence for margins in money or security, and not finding Jones at home, Baldwin made known his business to a daughter of Jones, and her testimony of the interview is as follows:

"Mr. Baldwin called at our house, No. 254 West Congress street, and asked for my father. I told him that he was not at home. He said that Mr. LeValley must have some money or security on account of the wheat bought for my father. I told him that he could not get it, as we had none to give; that my father did not know anything about wheat and that they ought to be ashamed to take advantage of an old man, and he said that was just what they were looking for—'suckers.'"

Baldwin's testimony was not taken, nor did appellant put his books in evidence.

We are of the opinion that the decrees dismissing the original bill and granting the relief prayed for in the cross-bill are right, and they are affirmed.

A motion was made by appellees to dismiss the original bill, because the transcript of the record is not made in compliance with the rules of the court, which was taken with the case.

The motion is not without merit, but inasmuch as the clerk of the court below may not have known how to make up a record of the peculiar character of this one, and was not specially instructed by appellant's counsel as to the order in which the record should be transcribed, and as a ruling on the motion can not now benefit or injure either party, it is overruled.

James McDonald v. John Weidmer.

1. *STATUTE OF LIMITATIONS—Payments by Joint Maker Without Co-Maker's Knowledge.*—Payment by one joint maker of a note does not bar the running of the statute as to his co-maker, when made without the knowledge, consent or subsequent ratification of the other.

2. *SAME—When Payment by Joint Maker Bars Running of the Statute as Against His Co-Maker.*—When payments are made from time to time by one joint debtor, with the knowledge, consent or subsequent ratification of the other, the running of the statute is arrested as to both joint debtors.

Assumpsit, on a promissory note. Appeal from the Circuit Court of Madison County; the Hon. MARTIN W. SCHAEFER, Judge presiding. Heard in this court at the February term, 1902. Affirmed. Opinion filed September 11, 1902.

JOHN G. IRWIN, attorney for appellant.

Partial payment by one joint debtor, without the knowledge or subsequent ratification of others, will not arrest the running of the statute as to them. *Kallenbach v. Dickinson*, 100 Ill. 427; *Boynton v. Spafford*, 162 Ill. 115; *Waughop v. Bartlett*, 165 Ill. 125.

A payment by one of several joint debtors, before the statute has completed a bar, will not prevent the completion of the bar as to the others, at the expiration of the time within which the statute required suit to be brought on the original evidence of the debt, relied on to sustain the action. *Kallenbach v. Dickinson*, 100 Ill. 443.

Where the joint maker of a note has unquestioned authority from his co-maker to make payments, his acts bind those whom he represents, to the extent of creating a new promise, and bringing an indebtedness otherwise barred from out the statute. *Waughop v. Bartlett*, 165 Ill. 125.

Ratification implied only when based on full knowledge of all facts and rights material to the conduct of the party thus bound. *Proctor v. Tows*, 115 Ill. 148; *Internat. Bank v. Ferris*, 118 Ill. 467.

TRAVOUS, WARNOCK & BURROUGHS, attorneys for appellee.

McDonald v. Weidmer.

MR. JUSTICE WORTHINGTON delivered the opinion of the court.

Suit on a note for \$300 at eight per cent interest, given for borrowed money, dated November 27, 1886, and due twelve months after date. The note was signed on the face by William Ray and by appellant, they being joint makers, but appellant being in fact a surety for Ray.

Jury waived, trial by court and judgment for plaintiff, from which defendant appealed.

Three payments are indorsed on the note, all of which were made by Ray. They are as follows: Interest \$24, November 27, 1887; interest \$50, November 27, 1889, and \$100, August 5, 1893.

Suit was commenced September 20, 1901. The defense urged is the statute of limitations.

Appellant insists that payments by Ray, a joint maker, without his knowledge, consent or ratification, did not arrest the running of the statute as to him, and that he is therefore released. Citing *Kallenbach v. Dickinson*, 100 Ill. 427; *Boynton v. Spafford*, 162 Ill. 115; *Waughop v. Bartlett*, 165 Ill. 124.

Appellee concedes that this is the law, but urges that the payments made were with the consent, knowledge or subsequent ratification of appellant.

Appellant and appellee were the only witnesses, and their evidence is conflicting. The trial judge having seen and heard both witnesses, we assume that where there was a conflict in evidence upon pivotal facts, that he gave credence to the testimony of appellee, and that his conclusion as to the facts is correct. The only question then remaining is, does the testimony of appellee show knowledge, consent or subsequent ratification by appellant, of the payments or any of them, made by Ray.

The case of *Kallenbach v. Dickinson*, *supra*, is the leading case in this state holding that payment by one joint maker of a note does not bar the running of the statute as to his co-maker. For this reason it is important to note the general statement of the law as made in that case

which precedes the lengthy and exhaustive opinion. It is as follows :

" Dickinson interposed the defense, by proper plea, that the cause of action did not accrue within sixteen years. The plaintiff replied that payments were made within sixteen years, and upon the issue thus formed the Circuit Court, upon trial, gave judgment for the defendant, Dickinson.

Dickinson was in fact but a surety on the note, Wenzel being its maker and the principal debtor. Wenzel made several payments upon the note within the sixteen years, but these were neither expressly authorized by Dickinson before being made, nor ratified nor assented to by him afterward. The question is, do the payments thus made afford sufficient evidence of a subsequent promise by Dickinson to remove the bar of the statute of limitations as to him."

It will be observed in the above quotation, that it is said, "but these (payments) were neither expressly authorized by Dickinson before they were made, nor ratified, nor assented to by him afterward." From this we infer that if these payments had been afterward "ratified or assented to," by the co-maker, that the running of the statute would have been arrested.

In *Granville v. Young*, 85 Ill. App. 167, the court say :

"We are of the opinion that when payments are made from time to time by one joint debtor, with the knowledge, consent or subsequent ratification of the other, the running of the statute is arrested as to both joint debtors."

In the case just cited, one of the joint debtors, who was a surety on the note, asked the payee if his co-debtor "kept up the interest on the note." The payee answered that he did, to which the reply was, "that was all right so long as the interest was paid." This was said seven years after the note was due, of which fact the payee had knowledge. The court say :

"Was this language a ratification on the part of appellant? Did he mean merely that he was satisfied or pleased that the interest was kept paid by the principal, or did he mean that he was content to let the note run so long as the interest was paid? We think the latter is the only reason-

able construction to be placed upon the language used, and certainly the only one which would be fair and just to appellee."

In the case at bar, appellee testifies that he told appellant of the payment of \$100, made by Ray in 1893, about a year after it was made; this would be six years after the note was due; and that appellant replied he "was glad of it and hoped he would get all of it out of him." Such language is not the expression of dissent or disapprobation, but is the language of approval and satisfaction. From it appellee would have been fully warranted in receiving subsequent payments from appellant, as authorized and desired by him.

Two of the conditions that arrest the running of the statute in favor of one joint maker, when a payment is made by his co-maker, as cited *supra* from Kallenbach v. Dickinson, are, "nor ratified nor assented to by him afterward." If this payment of \$100 was then either ratified or assented to afterward by appellant, the running of the statute was arrested as to him in 1893.

Appellee further testifies to language used by appellant in 1897, and again in 1899, which shows that appellant then considered that he would have the note to pay if not paid by Ray.

It is also in evidence that four new notes were made in 1898, three covering the principal and one the interest, and that appellant went to see Ray about signing them. Before appellant went to see Ray, appellee testifies, "We had a conversation in which he (McDonald) said he was going to sign them and get them so he could go in on the crop on him (Ray)." When taken to Ray, it appears that the time of payment was so changed by Ray, that they were not acceptable to either appellant or appellee, and were returned to appellant. In his testimony he denies that he was to sign these new notes, but in his letter in evidence, Exhibit E, he writes, "I return these notes to Ray which I was to give you, if everything went as he should of had it."

Considering the statement of appellant with reference to

the hundred dollar payment in connection with his subsequent statements and actions, we think the court was justified in holding that appellant assented to, and ratified the hundred dollar payment previously made. He was glad that it had been made and hoped that appellee "would get all of it out of him."

Both appellant and appellee are presumed to have known the law, and therefore to have known the legal effect of the assent to the payment, and to have acted accordingly.

Appellee does not rely upon the subsequent statements of appellant as promises to pay, made after ten years from the maturity of the note. The evidence introduced upon this feature of the case, and objected to by appellant, was limited to the purpose of tending to prove a ratification by appellant of the payments made by Ray.

Upon this theory its probative force may be slight, but it was competent if it tended, although but slightly, to prove that appellee did ratify or assent to the payment.

The judgment of the Circuit Court is affirmed.

M. S. Jolivette v. The Estate of R. J. Young, Deceased.

1. EVIDENCE—*Must Not Be Too Remote or Conjectural*.—The law requires an open and visible connection between the principal and evidentiary facts, and the deductions from them, and does not permit a decision to be made on remote inferences.

Claim in Probate.—Error to the Circuit Court of Jackson County; the Hon. OLIVER A. HARKER, Judge presiding. Heard in this court at the February term, 1902. Reversed and remanded. Opinion filed September 11, 1902.

C. E. RITCHER, attorney for plaintiff in error.

JAMES H. MARTIN, attorney for defendant in error.

MR. PRESIDING JUSTICE BIGELOW delivered the opinion of the court.

Plaintiff in error filed in the Probate Court of Jackson

County a promissory note for \$500, bearing date September 2, 1898, payable to the order of herself, one year after date, with interest at six per cent, purporting to have been executed by R. J. Young, the deceased, and asked for an allowance of the claim against his estate, to which the administrator objected. A trial was had before the court, who disallowed the claim and filed his written opinion, giving as the sole reason for disallowing it, that the note had been changed by writing the word "one" over the word "five" in the first line of the body of the instrument, thus making it read "one year after date," instead of "five years after date," etc. Plaintiff in error appealed to the Circuit Court of Jackson County, where a jury was waived, and the case was tried by the court, the defendant in error in that court contending that the entire note was a forgery. The court found for the defendant and the plaintiff has brought the case here by a writ of error, for review by this court.

The original note was, by agreement of the parties, certified to this court as a part of the bill of exceptions. The opinion of the County Court also comes here as a part of the bill.

A verified motion by defendant in error, for leave to file certain documents purporting to be signed by plaintiff in error, that this court may compare the signatures with the signature to the note sued on in this case, was filed and taken with the case; and a cross-motion by plaintiff in error to strike the motion of defendant in error from the files, was also taken with the case, but owing to the condition of the record as we find it, no ruling becomes necessary on either motion; but counsel should understand that this court can not consider evidence going to the merits or demerits of the case, that was not offered in the court below, and is not contained in the bill of exceptions.

The errors assigned are : 1st. "The admission of improper testimony over plaintiff's objection." 2d. "The rejection of proper evidence offered by plaintiff." 3d. "The judgment is contrary to the law, and not supported by the evidence."

It is of no avail to object to the ruling of a court in admitting improper testimony, unless an exception is taken to the ruling admitting it; hence, the most of the alleged errors of the court in admitting improper testimony on behalf of the defendant must remain unnoticed, because no exceptions were taken to the rulings admitting it.

A son of deceased was called and testified on behalf of defendant, and after stating where his father was living at the date of the note, he was asked if his father had any considerable sum of money at that time, to which plaintiff objected, but the court overruled the objection and the plaintiff excepted. How such testimony could throw light on the question as to whether the note was genuine or not we are unable to understand. In the case of *Xenia Bank v. Stewart*, 114 U. S. 224, where the matter determined was analogous to this, the court said :

“The evidence offered was inadmissible, because too remote and conjectural. The law requires an open and visible connection between the principal and evidentiary facts, and the deductions from them, and does not permit a decision to be made on remote inferences.”

The evidence offered in this case to which plaintiff objected, was too remote and conjectural to be of any value, and to open the door and let in such testimony would be to enter a field that has no boundaries. The court erred in overruling plaintiff's objection to the evidence.

The issue tried was not that the note had not been altered by writing the word “one” over the word “five,” as plaintiff admitted the alteration when the note was offered in evidence, by putting a witness upon the stand, who testified that she was present when the alteration was made, and that the deceased made the alteration before the note was delivered to the plaintiff, and this evidence is nowhere contradicted.

As to the second assignment of error, we are unable to find any ruling of the court excluding evidence offered by plaintiff, where any exception was taken.

The third assignment of error is not well taken. No motion for a new trial was made in the case that called in ques-

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tion the sufficiency of the evidence to sustain the judgment, and no exception was taken to the judgment that is shown in the bill of exceptions. It is true the clerk in writing up the judgment makes his record also say, that plaintiff "excepted" to the judgment; but this, as has uniformly been held by both the Appellate and Supreme Courts of this State, is of no avail, as the exception must be preserved in the bill of exceptions.

For the error in admitting improper evidence on behalf of the defendant, the judgment is reversed and the cause remanded for a new trial.

Henry C. Massey v. The People, ex rel., etc.

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1. STATUTES—*Sec. 34, Chap. 24, R. S. 1901.*—By Sec. 34, Chap. 24, R. S. 1901, providing that the city council shall be the judge of the election and qualification of its own members, the legislature did not intend to take away the power of the courts to inquire into a person's title to the office of alderman and to invest the council alone with that power.

2. QUO WARRANTO—*Prosecutor Need Not Prove Title in Himself.*—The prosecutor is not obliged to prove title in himself to sustain the action of quo warranto; the respondent must show by what authority he claims, the state being obliged to answer only the particular claim made by the respondent in his plea.

3. SAME—*Necessary Allegations.*—It is sufficient to allege generally that the respondent is in possession of the office without lawful authority. It is not necessary to set forth in the information, the facts which would negative the respondent's title, and the latter can not, therefore, demur to it for that deficiency, if otherwise sufficient, but must in all cases where he relies upon his own title, make a showing of it by his own pleadings.

Information in the Nature of Quo Warranto.—Appeal from the Circuit Court of Jefferson County; the Hon. EDMUND D. YOUNGBLOOD, Judge presiding. Heard in this court at the February term, 1902. Affirmed. Opinion filed September 11, 1902.

FARTHING & PEAVLER and G. GALE GILBERT, attorneys for appellant.

The defendant must by his plea disclaim or justify, and

if, as in this case, he is charged with the usurpation of an office, and seeks to justify, his plea must show by what authority he claims. A. & E. Ency. P. & P., Vol. 17, p. 467; Dillon on Municipal Corp., Vol. 2, Sec. 893, 4th Ed.

D. H. WELLS, CONRAD SCHUL and WILLIAM H. GREEN,
attorneys for appellees.

MR. PRESIDING JUSTICE BIGELOW delivered the opinion of the court.

The state's attorney of Jefferson county, at the instance of two relators, on the 3d of May, 1901, filed an information in the nature of a quo warranto against the respondent Massey, charging him with usurping the office of alderman of the first ward, in the city of Mt. Vernon. Respondent filed three pleas to the information; replications were filed to the pleas. Respondent then demurred generally and specially to the replications; the court sustained the demurrers, and on motion of the state's attorney the demurrers were carried back to the pleas, and they were adjudged to be insufficient; respondent standing by his pleas refused to plead further.

Judgment of ouster was then rendered against him; the cause is here by virtue of an appeal from that judgment. It will not be necessary to notice any pleadings other than the information and the pleas.

The substance of the allegations of the information is, that the respondent, for the space of twenty-four hours and more, unlawfully held and executed, and still usurps and executes, without any authority of law, the office of alderman from the first ward of the city of Mt. Vernon, to the damage and prejudice of the people of the State of Illinois; that at a meeting of the city council, after canvassing the votes for alderman in the first ward, the city council declared the candidates at said annual city election (Henry C. Massey and Henry B. Hinckley) to have received an equal number of legal votes, to wit, 117; that the council declared the vote to be a tie, and directed the candidates (Massey and Hinckley) to draw lots, and Hinckley drew

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the lot winning the office and was declared elected; that Hinckley was sworn in and did immediately assume and perform the duties of alderman; that thereafter the commission of alderman from the first ward was issued to Hinckley, signed by the mayor and city clerk of Mt. Vernon and delivered to him; that on the 2d of May, 1901, Massey, without warrant of law, forced himself into the office of alderman and obtained illegal recognition from the mayor and a portion of the council, and now usurps the authority of said office in defiance of the rights of Hinckley and of the people; that respondent was not legally elected; and prays that he answer by what warrant he claims to execute the office of alderman.

First plea: That on the 16th of April, 1901, at the annual election in the city of Mt. Vernon, held for the purpose of electing a mayor and other city officers, respondent was a candidate on the republican ticket for alderman in the first ward; that he received a majority of all the legal votes cast in the ward; that he was a *bona fide* resident of the ward, had resided in the ward more than two years and possessed all the legal qualifications for said office; that on the 2d of May, 1901, he took the oath as alderman to support the constitution, etc., and filed the oath with the city clerk; that by this warrant he holds the office of alderman.

Second plea: That at the annual city election in 1901, respondent was the candidate for office of alderman on the republican ticket in the first ward of the city of Mt. Vernon, and Hinckley was the candidate on the democratic ticket in the same ward; that respondent received 119 legal votes for said office; that Hinckley "received a much smaller number of legal votes;" that two persons, illegal voters (naming them), voted for Hinckley; that the returning board by counting said illegal votes for Hinckley, returned that respondent and Hinckley each received 117 votes for said office; that respondent on April 18, 1901, filed his petition to contest said election before the city council, and secured service on Hinckley, and that on the 2d of May, at a regular meeting, the city council heard the contest and

declared appellant had been elected to said office; that he then took the oath as alderman; that respondent possessed all the legal qualifications, etc.

Third plea: That at the said annual city election, respondent was a candidate for alderman in the first ward, and that Hinckley was the opposing candidate; that respondent was forty-eight years old and had resided in the ward three years, and possessed all the legal qualifications for said office, as required by law; that he received 119 legal votes for said office; that "said Hinckley received a much smaller number of legal votes; that a large number of illegal votes were cast and counted for said Hinckley; that legal votes were cast for this defendant, but not counted for him;" that respondent received a majority of all legal votes cast for alderman in said ward; that on the 2d of May, 1901, defendant took the oath of office of alderman, by which warrant, etc.

It seems to be assumed by both parties to the record that the Circuit Court has jurisdiction in this matter, notwithstanding the fact that section 34 of chapter 24, Rev. Stat. 1901, provides that "the city council shall be the judge of the election and qualification of its own members." That the legislature, by such a provision, intended to take away the power of the courts to inquire into a person's title to the office of alderman and to invest the council alone with that power, is affirmed in *People v. Harshaw*, 60 Mich. 200. But in *People v. Hall*, 80 N. Y. 117, such intention is denied.

The question has not been directly passed upon by the Supreme Court of this State, but in view of the comprehensive reasoning in *Snowball v. People*, 147 Ill. 260, and in view of the fact that the power has not been challenged by counsel, we also assume that such power exists in our courts.

Before passing upon the main question involved in the pleas, it will be well, in view of the disagreement of counsel as to how issues are to be framed in this kind of a proceeding, to state a few elementary principles of pleading

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in relation to quo warranto. The prosecutor is not obliged to prove title in himself to sustain the action; the respondent must show by what authority he claims, the state being obliged to answer only the particular claim made by the respondent in his plea. High's Extraordinary Legal Remedies, Sec. 629; *Clark v. People*, 15 Ill. 217; *Place v. People*, 192 Ill. 160. It is sufficient to allege generally that the respondent is in possession of the office without lawful authority. High's Extraordinary Remedies, Sec. 713.

"It is not necessary to set forth in the information the facts which would negative the respondent's title, and the latter can not, therefore, demur to it for that deficiency, if otherwise sufficient, but must in all cases where he relies upon his own title, make a showing of it by his own pleadings." *People ex rel. Larke v. Crawford*, 28 Mich. 88.

Applying these rules to the information before us, it is evident that the first paragraph quoted contains all that is necessary to a good information in the nature of a quo warranto.

The second paragraph of the information, in which the relators attempt to set forth the title of Hinckley to the office, forms no legal part of the pleading upon which either an issue can be taken, or can form subject-matter which a plea of the respondent can confess or avoid. Nor can the facts disclosed by the averments of Hinckley's title aid the pleas in passing on their validity. Hinckley is not seeking to defeat respondent and be inducted into office by showing the superiority of his title.

Appellee claims the pleas are defective in not sufficiently alleging that respondent is a qualified elector; that the allegation "that he is a resident of the ward and has been for two years prior to the election," is insufficient. In *Blanck v. Pausch*, 113 Ill. 60, an allegation by a petitioner in a contested election that he was a "citizen" was deemed insufficient. All the pleas in this case, however, allege that "he possessed all the legal qualifications for said office." Whether this relieves the pleas from objection, we shall

not stop to determine; all of the pleas are, in our opinion, insufficient on other grounds.

By section 57 of chapter 24, Rev. Stat. 1901, it is made the duty of election boards to return, within two days, the results of the election to the city council, whose duty it then is to canvass the returns and declare the result of the election. By section 59 of same chapter, it is made the duty of the city clerk to notify all persons elected to office within five days after the result of the election is declared; "and unless such persons shall respectively qualify in ten days after such notice, the office shall become vacant." Section 75 of the same chapter provides that all officers elected shall, before entering upon their duties, take and subscribe an oath which shall be filed with the clerk of the city. Unless the oath is taken the title to the office will fail. *Simons v. People*, 18 Ill. App. 588.

Granting that respondent was legally qualified and elected to the office, he still has made no case which shows the continued existence of every qualification necessary to the enjoyment of the office.

Under section 59, above quoted, such an averment is necessary, because certain qualifying acts are to be done by candidates elect after they have received notice of their election. See 2 Spelling on Injunction and Extraordinary Remedies, Sec. 1857; *State v. Beecher*, 15 Ohio 723; *People v. Mayworm*, 5 Mich. 146. For anything that appears in any of the pleas, the city council of Mt. Vernon met on the 18th of April, 1901, two days after the election, and declared the respondent was elected, and for aught that appears in the pleas, the city clerk notified respondent of that fact either on the 19th, 20th or 21st of April, in which event he should have filed his oath of office either on the 29th or 30th of April, or on the 1st of May, failing to do which the office became vacant. The pleas aver that the oath was filed on May 2, 1901. If the fact is that the council, in canvassing the votes, refused to declare respondent elected, the pleas should have so stated, for no duty could then rest on respondent to file an oath within ten days, because in such

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case no notice would be given. In either aspect of these matters all of the pleas are silent, unless the statement in the second plea "that on the 18th of April, A. D. 1901, he filed his petition to contest said election before the city council," etc., shall be held sufficient to cover the defects pointed out. The most that can be claimed by appellant for the averment is that it is an argumentative allegation, in effect, he says, because he filed his petition to contest the election; therefore the city council must have refused to declare respondent elected, and in such view of the case, the fault can only be reached by a special demurrer. All pleadings are to be construed most strictly against the pleader, and this well established rule applies with peculiar rigor when the sovereign calls upon the individual to show by what right he assumes to do official acts.

The fact that appellant filed his petition with the city council to contest the election, is not an exclusion of the idea that the council may have declared him elected, and that he received notice of the fact at such a time that he was bound to file his oath of office before the 2d of May. We can take nothing for granted in favor of respondent's title. Of course we do not mean to be understood as saying that respondent's title to the office depends in the end on what the city council did or did not do in declaring the result of the election, or on what the city clerk did or did not do by way of giving respondent notice. The failure of the city officers in duties toward appellant, can not deprive him of an office to which he is in fact elected; what we decide is, that if he was declared elected and was notified of the fact, he was bound to file the oath of office within ten days from the date of the receipt of the notice, failing to do which the office became vacant, even though respondent was legally qualified for the office and legally elected; and as the pleas do not exclude a state of things which may show that he has lost the title to the office, after a lawful election, the judgment of ouster on the pleas is correct.

If it should be conceded that the averments in the second plea, in reference to the contest carried on before the council, are sufficient in law to show the legality of the council's

act in declaring respondent elected, nevertheless such determination by the council can not be a bar to this proceeding. *Patterson v. People*, 65 Ill. App. 651; *Snowball v. People*, *supra*.

The judgment of ouster is affirmed.

Webster W. Wilcox v. Guy Tetherington.

1. **PROMISSORY NOTES**—*Equitable Defenses Against Indorsee*.—An equitable defense that might be made against the original payee, can not be made against his indorsee, taking the note for value, before due, nor against subsequent indorsees.

2. **SAME**—*Care in Executing*.—A person executing a promissory note which is procured by fraud and circumvention should use reasonable and ordinary precaution to avoid imposition. If able to read readily, he should examine the instrument or procure it to be read by some one in whom he can place confidence. If he is unable to read, or does so with difficulty, then he should avail himself of the usual means of information, by having it read by some person present. He may not act recklessly, disregard all the usual precautions to learn the contents of the instrument, and then interpose the defense against an assignee.

3. **JUSTICES OF THE PEACE**—*Pleadings Before*.—No written pleadings are required in proceedings before justices of the peace. The allegations and counter allegations of the parties or their attorneys are all presumed to be *ore tenus* and their rights depend upon what is proved, rather than upon what is said or pleaded.

4. **NEGLIGENCE**—*When One of Two Persons Must Suffer Loss*.—When one of two persons must suffer loss, he who by his negligent conduct has made it possible for the loss to occur, must bear it.

Assumpsit, upon a promissory note. Appeal from the County Court of Madison County; the Hon. W. P. EARLY, Judge presiding. Heard in this court at the February term, 1902. Affirmed. Opinion filed September 11, 1902.

BANDY & SULLIVAN, attorneys for appellant.

BURTON & WHEELER and THOS. STALLINGS, attorneys for appellee.

MR. JUSTICE WORTHINGTON delivered the opinion of the court.

This action was commenced before a justice of the peace

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upon a promissory note for \$60 and legal attorney's fees, dated December 14, 1900, and due July 1, 1901, made to Geo. C. Strathern, payee, by appellant, Webster W. Wilcox. The trial resulted in a judgment for defendant, from which plaintiff appealed to the County Court, where judgment was rendered for appellee, from which defendant appealed.

It does not appear that the execution of the note was denied at the trial before the justice.

On the note are these two indorsements: "Pay to the First National Bank of Granite City or order, Geo. C. Strathern." "For collection, J. F. Krishmer, cashier First National Bank." Appellant insists that the indorsements show that the note was assigned for collection only. The note is brought with the record for our inspection. The indorsements do not sustain appellant's claim. The first is a general indorsement by the payee to the bank. The second is an indorsement by the bank for collection. The presumption from these indorsements is, that the bank was a *bona fide* holder and owner of the note for value, before its maturity.

An equitable defense that might be made against the original payee can not be made against his indorsee, taking the note for value, before due, nor against subsequent indorsees. *Woodworth v. Huntoon*, 40 Ill. 131; *Matson v. Alley*, 141 Ill. 287; *Burton v. Perry*, 146 Ill. 119.

Upon appeal to the County Court, the case stood for trial *de novo* without written pleadings. Appellant filed, however, what purports to be a sworn plea of fraud and circumvention in procuring the execution of the note, to which a demurrer was filed, and was sustained by the court. Appellant abided by his plea. The trial was by the judge, although a jury was not formally waived. Upon computation by the clerk, judgment was rendered against appellant for the principal of the note, an attorney's fee of \$15, interest and costs. Testimony was heard as to the amount to be allowed for attorney's fees.

The errors assigned are:

"First. That the court erred in sustaining plaintiff's

demurrer to the plea of fraud and circumvention. Second. That the court erred in rendering final judgment for the plaintiff on sustaining the demurrer to said plea."

Appellant's first assignment of errors is not well taken. In *Dodge v. People*, 113 Ill. 491, it is said :

"It is the settled construction of our statute relating to proceedings before justices of the peace, that no written pleadings are required. The allegations and counter-allegations of the parties or their attorneys are all presumed to be *ore tenus*, and their rights depend upon what is proved, rather than upon what is said or pleaded."

Written pleadings not being required, appellee was not obliged to file either demurrer or replication to appellant's plea. Its legal effect was that of an affidavit denying the execution of the note. This would require proof of its execution when offered in evidence, if objection was made to its introduction. The record does not show that appellant either objected or excepted to its introduction. Such being the case, there is nothing for this court to pass upon on account of the note having been introduced in evidence. If the plea, treated as an affidavit, was sufficient to put plaintiff to the proof of its execution, it was sufficient to entitle defendant to offer evidence of fraud and circumvention in procuring his signature. Appellant did not suffer, then, in any way through the action of the court in sustaining the demurrer to his plea.

While it is true that the case was tried by the judge without a jury, it is also true that appellant stood by and suffered it to be so tried, without protest or demand for a jury. He can not now be heard to complain of what he might have prevented. Silence implies assent, by waiving objections when they should be made.

It may be said, too, on the merits of the case, that we have been cited to no instance where it has been held that a misrepresentation by a total stranger, though frank in manner and claiming to be recommended by a national bank, as appellant in his plea states, has been held sufficient to defeat an action on a promissory note, plainly legible, and assigned before maturity to a holder for value, when the only excuse of the maker is that he was too busy to

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read the note. A mere glance at the paper would have disclosed its character to a man of ordinary business qualifications. That appellant was such a man was apparent from his sworn plea. He was contracting to collect premiums upon insurance policies, and was to sign a contract and bond as such collector.

He states as a reason for not reading the paper which he signed, that he was busy in discharging his duties as time-keeper for the American Steel Foundry. Such statement implies ordinary business ability and experience, from which negligence may be inferred in one who signs a note, tendered by a stranger, without reading it, on the excuse that he was too busy to read it.

References to Illinois decisions, when the maker has not read the instrument, and the signature has been held to have been fraudulently procured, show no such negligence as appellant disclosed in his plea.

The trend of the decisions in the Illinois courts is expressed in *Taylor v. Atchison*, 54 Ill. 199 :

"It is, however, necessary that persons executing such an instrument, which is procured by fraud or circumvention, should use reasonable and ordinary precaution to avoid imposition, when the suit is by an indorsee before maturity. If able to read readily, he should examine the instrument, or procure it to be read by some one in whom he can place confidence. If he is unable to read, or does so with difficulty, then he may avail himself of the usual means of information, by having it read by some person present. He can not act recklessly, disregard all the usual precautions to learn the contents of the instrument, and then interpose the defense against an assignee."

To the same effect are *Leach v. Nichols*, 55 Ill. 278; *Mead v. Munson*, 60 Ill. 50; *Homes v. Hale*, 71 Ill. 554; *Anderson v. Warne*, 71 Ill. 22; *Wheeler and Wilson Co. v. Long*, 8 Ill. App. 465; *Ex. Nat. Bank v. Plate*, 69 Ill. App. 490; *Muhlke v. Hegerness*, 56 Ill. App. 326.

"When one of two persons must suffer loss, he who by his negligent conduct has made it possible for the loss to occur, must bear it." *Fulford v. Block*, 8 Ill. App. 286.

For the reasons cited, the judgment of the County Court is affirmed.

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115 610

William H. Hudelson v. James C. McCollum et al.

1. *PRACTICE—Where the Evidence is Conflicting.*—Where the evidence is conflicting a verdict returned by a jury, if responsive to the issues involved, ought not to be set aside by a trial court and will not be disturbed by an appellate or supreme court, unless some error or improper condition or conduct calculated to mislead the jury appears in connection with the trial.

Assumpsit, on a promissory note. Appeal from the Circuit Court of Clay County; the Hon. WILLIAM M. FARMER, Judge presiding. Heard in this court at the February term, 1902. Affirmed. Opinion filed September 11, 1902.

W. H. DILLMAN, attorney for appellant.

ROSE & BONNEY, attorneys for appellees.

MR. JUSTICE CREIGHTON delivered the opinion of the court.

This was an action of assumpsit in the Circuit Court of Clay County, by appellant against appellees to recover on a promissory note for \$842. Defendants pleaded payment. The only controverted question was as to the alleged payment. Trial by jury. Verdict in favor of appellees and judgment on the verdict against appellant for costs.

This case has been three times tried in the Circuit Court. Has been submitted to three separate juries, under the directions of three separate judges. The first trial resulted in a verdict in favor of appellees. The verdict was set aside by the court and a new trial awarded. The second trial was in favor of appellant. This also was set aside by the court. The third verdict was in favor of appellees, and the court rendered judgment thereon, as above noted. The evidence, as to the only issue of fact in dispute, is conflicting, directly contradictory and wholly irreconcilable. That a verdict returned by a jury under such state of evidence, if responsive to the issues involved, ought not to be set aside by a trial court, and will not be disturbed by an appellate or supreme court, unless some error, or improper condition or conduct calculated to mislead the jury, appears in connection with the trial, is too well established in this

state to admit of discussion. The following are three of the leading cases in which our Supreme Court has laid down and applied the rule: *I. C. R. R. Co. v. Gillis*, 68 Ill. 317; *Calvert v. Carpenter*, 96 Ill. 63; *Shevalier v. Seager*, 121 Ill. 564.

During the trial counsel for appellant produced a bank journal, one of a set of books kept by a bank in which appellant was accustomed to make deposits, and sought to introduce this in evidence. They cite us to section 3, chapter 51, of our statutes, and to many decisions thereunder. The bank was no party to the suit and in no way privy to either parties. Neither the claim nor the defense was founded on a book account, and the book offered was not the account book of any party to the suit, nor of any person interested therein. The section relied on by appellant's counsel is as follows:

"Section 3. Where, in any civil action, suit or proceeding, the claim or defense is founded on a book account, any party or interested person may testify to his account book and the items therein contained; that the same is a book of original entries, and that the entries therein were made by himself, and are true and just; or that the same were made by a deceased person, or by a disinterested person, a non-resident of the state at the time of the trial, and were made by such deceased or non-resident person in the usual course of trade, and of his duty or employment."

There was no attempt to offer this book, or any item therein, as a contemporaneous writing, and no sufficient foundation was laid for such an offer. The trial court did not err in excluding the bank journal. The only remaining question is as to the instruction given by the court on behalf of appellees. The court gave but three instructions—two on behalf of appellant, one telling the jury that possession of the note by appellant raises the presumption that it has not been paid, and one telling them that it devolved upon appellees to prove payment by a preponderance of the evidence, and that unless payment was so proven the jury should find for appellant. The instruction given on behalf of appellees is as follows:

"The court instructs the jury that if you believe from

the evidence in this case that since the making of the note in question, and since the note became due and payable, and since the payment thereof was assumed, if you so find from the evidence that payment was assumed by J. C. McCollum as one of the defendants herein, he, the said McCollum, and the plaintiff herein, Wm. H. Hudelson, have had settlements of their accounts against each other, in which transactions the said note has been paid to the plaintiff, or any one for him by the said J. C. McCollum, or by any one else for him, then your verdict should be for the defendant."

The testimony shows that soon after the making of the note in question, as between himself and his co-makers of the note, McCullom had assumed its payment and that appellant had knowledge of that fact; that appellant and appellee McCollum had transactions together, in which McCollum turned over to appellant notes, and that they had one or more settlements. The testimony also tends to show that appellant owed the Louisville Mercantile Co. an account which was to apply on the interest, and in that manner the Louisville Mercantile Co. paid a part of the note to appellant for McCollum. The testimony also tends to show that appellant usually placed his notes in bank for collection, and the cashier of the Farmers and Merchants Bank testified that before suit was commenced on the note in question, he heard appellant say time and again that he, appellant, was satisfied McCollum had paid the note. "Hudelson said, 'I am satisfied McCollum paid the note,' but he, Hudelson, never got the money." The instruction is supported by the evidence, does not misstate the law, and there is no substantial error in it.

The judgment of the Circuit Court is affirmed.

The People ex rel., etc., v. Frank Perrin et al.

1. *MANDAMUS—Petition Must Show Clear Right.*—A petition for mandamus must show on its face a clear right to the relief asked. It must distinctly set forth all the material facts relied upon, so that the same may be admitted or traversed.

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2. *SAME—What Petitioner Must Show.*—Two rules in regard to the issuance of a writ of mandamus are well settled: First, the party applying for it must show a clear legal right to have the thing done which is asked for; second, it must be the clear legal duty of the party sought to be coerced, to do the thing he is called upon to do.

Petition for Mandamus.—Appeal from the Circuit Court of St. Clair County; the Hon. WILLIAM HARTZELL, Judge presiding. Heard in this court at the February term, 1902. Affirmed. Opinion filed September 11, 1902.

This is a petition for a writ of mandamus, commanding Frank Perrin, judge of the County Court of St. Clair County, to audit the account of petitioner, Louis G. Spanagel, as chief clerk of the board of election commissioners of the city of East St. Louis, and to issue a warrant upon the treasurer of said county in favor of petitioner, for the sum of \$50 as a balance due petitioner on his salary as said chief clerk for the month of July, A. D. 1901, and commanding Adolph Andel, the treasurer of said county, to pay said warrant when issued.

Appellees demurred to said petition, as follows:

“And now come the defendants and demur to the petition herein, and say that the same in manner and form, as the same is above pleaded, is insufficient in law, and for cause of demurrer show:

1. The petitioner has an adequate remedy by appeal.
2. The petitioner has not stated a cause of action.
3. There is no salary due the petitioner.
4. Petitioner's salary can not be increased or diminished during his term of office.

Wherefore, and for divers other good and sufficient causes of demurrer appearing upon the face of the petition, defendants pray judgment, etc.”

The demurrer was sustained, and judgment for costs entered against petitioner, from which he appeals.

The petition alleges in apt form the organization of the board of election commissioners and his appointment as chief clerk on January 3, 1900, by Thomas Canavan, Louis Boesmenne and Gustav Horn, then constituting said board. That on the 7th of January following he took the oath required by law and duly qualified. That he was again

appointed December 22, 1900. That by virtue of said latter appointment, he has continued from thence hitherto to perform the duties of said clerk. That by Sec. 1 of Article 7 of Chap. 46, Act of 1885, Statutes of Illinois, the compensation of said clerk was \$600 per annum. That by an amendment of said act, in force July 1, 1891, the salary of said clerk was fixed at \$1,200 per annum.

Petitioner further alleges that it has been the custom of the county judge of said county on or before the fifth day of each month, to audit the accounts of the commissioners and the chief clerk for the preceding month, and to draw his warrant upon the county treasurer for the payment of the amount found due. That for the month of July, 1891, there was due petitioner, as chief clerk, the sum of \$100. That on the 2d day of August the said judge of the County Court audited the account of petitioner and drew a warrant for the sum of \$50, as the pay of petitioner for said month. That thereupon petitioner moved the court to audit his account as said clerk and draw the warrant upon the county treasurer for the sum of \$100, as the act provided, whereupon the County Court then and there denied the motion and refused to draw a warrant for more than \$50, and still refuses so to do. That your petitioner thereupon excepted to the action of the judge, which proceedings are a matter of record in the records of said court, appearing as follows:

"August 2, 1901, personally appeared in open court, this day, Louis Spannagel, chief clerk of the board of election commissioners of the city of East St. Louis, and moves the court to allow him the sum of \$100 as salary as such chief clerk for the month of July, A. D. 1901, pursuant to an act of the General Assembly of the State of Illinois, approved May 11, 1901, and in force July 1, 1901. It appearing to the court that the said Louis Spannagel was appointed to the office prior to the time said act went into force, said motion is denied to the extent of allowing any amount over \$50, and it is ordered that \$50 be allowed for his salary for said month, and order is issued, exceptions by said chief clerk, by means whereof the petitioner is deprived of the said sum of \$50 due him as chief clerk of said board of elec-

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tion commissioners, to which he is justly and lawfully entitled under the act aforesaid."

DAN MCGLYNN, attorney for appellant.

JAS. A. FARMER, attorney for appellees.

MR. JUSTICE WORTHINGTON delivered the opinion of the court.

A petition for mandamus must show on its face a clear right to the relief asked. It must distinctly set forth all the material facts relied upon, so that the same may be admitted or traversed. *People ex rel. v. Glann*, 70 Ill. 234; *Canal Trustees v. People*, 12 Ill. 254.

It is said in *C. & A. R. R. Co. v. Suffern*, 129 Ill. 281:

"Two rules in regard to the issuance of a writ of mandamus are well settled: first, the party applying for it must show a clear legal right to have the thing done which is asked for; second, it must be the clear legal duty of the party sought to be coerced to do the thing he is called upon to do."

To the same effect is *Lawrence E. McGann v. The People*, etc., *ex rel. Coffeen*, 194 Ill. 526.

Tested by these rules, the petition is clearly insufficient. It does not aver that petitioner, upon his appointment on December 22, 1900, took the oath of office which he avers in his petition, when appointed in January, 1900, he was in law required to take.

It does not aver that when the petitioner applied to the county judge for a warrant for \$100 that that amount, under the statute, was due petitioner.

The averment is, that it has been the practice and custom of the county judge to audit the accounts of the commissioners and chief clerk on or before the fifth day of each month, for the month next preceding.

For all that appears in the petition, this may have been the custom, and yet it may not be the duty of the judge, under the statute, to audit and issue a warrant monthly. Nor does the statute direct that the salary of the chief clerk shall be paid monthly. The only provision in the statute is, that the said chief clerk shall be paid "a salary

of \$1,200 per annum" and that "it shall be the duty of the governing authority of such counties and cities to make provision for the prompt payment of such salaries and expenses." Hurd's Stat., Sec. 281, p. 833.

The statute imposed no duty upon the county judge to audit a monthly account for salary any more than it does to audit it weekly or quarterly.

An averment that the salary of the petitioner, under the statute, was then due, and that it was the duty of the judge therefore to audit the amount and issue the warrant, was a necessary averment.

The petition asked also for a writ compelling the treasurer to pay a warrant, which it shows was never issued. As there is no averment in the petition that the treasurer refused to pay the warrant for \$50 which the judge did issue, it can not be ground for mandamus against him, that he has not paid a warrant which the judge refused to issue.

The petition failing to show a breach of duty on the part of the county judge to audit and issue a warrant, and failing to show any refusal of the county treasurer to pay an issued warrant, the demurrer was properly sustained.

This being so, the other questions sought to be raised are not before us for consideration.

Judgment affirmed.

Isaac Cannon, Adm'r, etc., v. The Michigan Mutual Life Ins. Co.

1. *CONTRACTS—Prior or Contemporaneous Agreements.*—Any promise or agreement concerning the terms and conditions of a contract made prior to or contemporaneously with the reducing of such contract to writing is merged in the writing.

Assumpsit, on a policy of life insurance. Appeal from the Circuit Court of Crawford County; the Hon. ENOCH E. NEWLIN, Judge presiding. Heard in this court at the February term, 1902. Affirmed. Opinion filed September 11, 1902.

J. E. McGAUGHEY, GEE & BARNES and BRADBURY & MAC-HATTON, attorneys for appellant.

JAMES McCARTNEY, attorney for appellee.

Any promise or agreement made prior to the written contract is merged in the writing. Commercial Acc. Co. v. Bates, 176 Ill. 194; Dow v. Whetten, 8 Wend. 160; Sullivan v. Ins. Co., 43 Ga. 423; 1 May on Insurance, Sec. 29, B.

MR. JUSTICE CREIGHTON delivered the opinion of the court.

This was an action of assumpsit by appellant against appellee, in the Circuit Court of Crawford County, to recover on a policy of life insurance. Trial by jury. Verdict and judgment in favor of appellee. With their verdict the jury returned answers to a number of special interrogatories, among them being the following :

“ Was or was not the policy of insurance sued on in this case ever delivered to the applicant, William Cannon? Answer: No. Was or was not William Cannon in good health when the policy on his life was placed in the mail at Detroit directed to the general agent of defendant at Chicago? Answer: No. Was or was not William Cannon in good health when the policy on his life was placed in the mail at Chicago directed to Ed. Ryan at Lawrenceville? Answer: No.”

The declaration is in the usual form, to which are pleaded many special pleas, among them the following: Special plea numbered two, in which defendant alleges that decedent, William Cannon, made an application to defendant, signed by him, in which it was agreed that if a policy was ever issued on said application, the same should not take effect until it was delivered to the said William Cannon, and he in good health; defendant further alleges in said plea that the said policy was never delivered, etc.

One Ed. Ryan was acting as soliciting agent for appellee at Lawrenceville, Illinois, and on November 28, 1899, entered into negotiations with William Cannon, appellant's intestate, which resulted in the making of an application by Cannon, to appellee company, for a policy of insurance on Cannon's life in the sum of \$5,000. At the date men-

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tioned one part of an application was filled out and signed by Cannon, and the following promissory note was signed and delivered to the agent :

"\$322.15

CANAAN, Nov. 28, 1899.

Sixty days after date I promise to pay to the order of Ed. Ryan, three hundred and twenty-two and 15-100 dollars, with interest at — per cent per annum, at Lawrenceville, Illinois. Value received. WILLIAM CANNON."

At this point in the negotiations the parties separated with the mutual understanding that they would meet again in Lawrenceville, to complete the application, by Cannon's making the answers and statements and submitting to the examination required of him as part of his application. In pursuance of this understanding they did meet again in Lawrenceville, on the 4th day of December, 1899, when the remaining part of the application was filled out, agreed to and signed by Cannon. Both parts of the application bear this date—December 4, 1899. The application contains the following agreements on the part of Cannon :

"I hereby agree that these statements * * * with this declaration, shall form the basis of the contract for insurance. * * * That the policy shall not take effect unless * * * the insured is in good health at the time of its delivery."

The completed application was in due course forwarded to the company's home office, and upon consideration of it by those charged with that duty, the company decided to accept the application and issue its policy, and accordingly, on the 15th day of December, 1899, a policy was prepared in the home office in Detroit, Michigan, and during the afternoon of that day, between four and five o'clock, it was mailed to E. H. Elwell, the company's general western manager at Chicago, Illinois. The policy was received by Elwell in Chicago, between ten and eleven o'clock on the forenoon of December 16th, and during the afternoon of that day, Elwell mailed it to the company's local agent at Lawrenceville, and the local agent at Lawrenceville received it between nine and ten o'clock on the forenoon of December 17th. At that time Cannon was

dead. He had taken ill about five o'clock on the morning of the 15th, and died at nine o'clock in the forenoon of the 16th. The policy was returned to the company. The premium for the policy was never paid. The note given to Ed. Ryan was never paid, nor presented for payment, nor presented to the company for acceptance or approval. The policy which was prepared and signed by the company contains the same provision as does the application signed by the applicant, viz: "This policy shall not take effect unless the insured is in good health at the time of its delivery to him." The policy never was delivered to Cannon. He was mortally ill and at death's door before the policy was written, and had been dead twenty-four hours when the policy reached the local agent, whose duty it was to deliver such policies if he should find all the conditions warranting a delivery to exist, and not otherwise.

Appellant's counsel sought, on the trial in the Circuit Court, to avoid the force and effect of the foregoing state of facts, by an offer to prove that on November 28th, at the time the first part of the application was signed and the note above quoted given to the local agent, Ryan, Ryan told Cannon if he would sign the note then, and a policy of insurance should ever be issued to him by the company, and he should die while the policy was in transit, and before it reached him, his estate would receive from the company every dollar of the policy, and that upon this statement Cannon signed the note and delivered it to Ryan. The trial court rejected this proffered evidence. In this ruling of the court there is no error. It is not claimed here, nor could it be claimed under the undisputed facts of this case, that there was any novation or subsequent waiver. This alleged oral promise, if made at all, was made pending the negotiations. Any promise or agreement concerning the terms and conditions of a contract made prior to or contemporaneous with the reducing of such contract to writing is merged in the writing. This is the general doctrine and applies as well to insurance contracts as to others. *Commercial Accident Company v. Bates*, 176 Ill. 194, is an

insurance case, and is conclusive. In that case the court say :

“Where a written application is required to be signed by the assured, and is so signed, and a policy of insurance is issued upon the application, as was the case here, the application and policy constitute a written contract by and between the assured and the insurance company, and where a controversy arises in regard to what the contract is between the parties, that controversy must be determined by the application and the policy. * * * A contract of that character can not rest partly in writing and partly in parol. It can not be varied, explained or added to by parol evidence. * * * When a contract of insurance is reduced to writing, the prior negotiations of the parties in respect to it are deemed to be merged in the document, which in law is conceived to be the evidence of the agreement they finally fix upon, and parol evidence is inadmissible to vary its terms.”

The undisputed facts in the branch of the case above discussed disclose that appellant had no cause of action. As the judgment will be affirmed, and in our opinion will never reach the Circuit Court again for trial, we do not deem it our duty to discuss any of the numerous remaining interesting questions raised upon the record and argued in the briefs.

The judgment of the Circuit Court is affirmed.

David Hersher v. Barton C. Wells.

1. REAL ESTATE BROKERS—*When Entitled to Commissions.*—A real estate agent who finds a purchaser on the terms fixed by the owner of the property, such purchaser being ready, willing and able to take a conveyance and pay the purchase price, has earned his commissions. The fact that the contract involved an exchange of lands does not change the rule announced. After such purchaser has been found it can make no difference whether defendant did or did not complete the trades, provided, in the latter event, the plaintiff did not interfere to bring about that result, or did not bring about the “trades” in the first instance by fraud.

2. SAME—*Ability of Purchaser to Make Exchange.*—A broker who

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supplies a purchaser must show, before he can claim his commissions, that the purchaser is able to make the exchange, and this ability is not proved by the mere production of deeds on his part, without some showing that he also had title to the properties he was willing to deed. His ability does not depend upon general financial responsibility, but upon his being owner of the lands it was proposed to exchange.

Assumpsit, for broker's commissions. Appeal from the Circuit Court of Jefferson County; the Hon. EDMUND D. YOUNGBLOOD, Judge presiding. Heard in this court at the February term, 1902. Reversed and remanded. Opinion filed September 11, 1902.

WILLIAM H. GREEN, attorney for appellant.

FARTHING & PEAVLER, attorneys for appellee.

A broker is entitled to his commission when he presents to his principal a purchaser who is ready, willing and able to complete the sale upon the proposed terms, or upon terms then agreed upon. And the principal can not relieve himself from liability by refusing to consummate the sale or exchange. *Hutten v. Renner*, 74 Ill. App. 124; *Pratt v. Hotchkiss*, 10 Ill. App. 603; *Monroe v. Snow*, 131 Ill. 126; *Schmidt v. Keeler*, 63 Ill. App. 487.

MR. PRESIDING JUSTICE BIGELOW delivered the opinion of the court.

Appellee recovered a judgment against appellant for \$80, which sum was claimed to be due appellee for commissions in procuring customers in two real estate transactions. A jury was waived and the cause was tried before the court; appellant submitted seven propositions to be held as the law of the case. Appellee submitted none. The court refused to hold all and each of the propositions.

The assignments of error relate to the correctness of the court's action in passing on the propositions and in rendering judgment against appellant.

The evidence tends to prove the contentions of each party. On the part of appellee the evidence tends to show that Hersher listed property with Wells, who is in the real estate business in Mt. Vernon; that the listing was "for sale or trade," Hersher indicating a selling price and a trading price; that appellee succeeded in getting appellant and

one Adkinson to agree to a trade; that Adkinson made out a deed for his property and tendered it to Hersher, who, without cause, refused to complete the trade by delivering a deed to his property; that the contract between appellant and appellee called for \$50 commission on this deal. The evidence tends further to show that one Green had some land in Missouri which he wanted to trade for city property in Mt. Vernon; that Wells showed Green some of Hersher's houses and that finally Green and Hersher agreed to a trade, and that Wells was to have \$30 commission on this deal; that the deeds were to be made the next day after the proposition for a trade had been accepted; that Green made out a deed for the Missouri land and tendered it to Hersher, who, without cause, refused to accept and refused to make a deed for the city property. The evidence is also to the effect that in neither case was there any contract in writing, or memorandum signed by Hersher.

On the part of appellant the evidence tends to show that he listed some of his real estate with Wells; that Wells "was to have no commissions unless the sale or trade was completed;" that Hersher and Adkinson never traded; that they had some talk of a trade, but were unable to agree on terms; that after Hersher refused to make out the deed to Adkinson appellee told him that he "was glad of it, as there was a law suit about the land;" that Adkinson did not insist on getting the deed. The evidence further tends to show that Green and Hersher talked of trading, but no trade was in fact made; that Green never gave Hersher any evidence of title to the Missouri land; that the day Green and Hersher were talking of trading, Hersher said he would meet Green the next day and see what could be done; that on the next day Hersher was called away on some other business, which prevented the interview; that Green did make out a deed to the Missouri land, and tendered it to Hersher, but he refused to accept it; that no writings were drawn up between Hersher and Adkinson or Hersher and Green.

The rule of law enunciated in the first six propositions

submitted by appellant to the court was to the effect that either the trade must have been consummated or the contract of trade must have been put in writing so as to be enforceable between the parties, and that if such were not the facts, then no commissions were earned by appellee.

We are of the opinion that all of the six propositions were properly refused. The court found against appellant's contention, that there were to be no commissions paid unless the trades were consummated; and the counter theory of appellee, that the contract with appellant was, that he was authorized to "sell or trade" the lands, was found to have existed. Under a contract of employment of that kind, a real estate agent who finds a purchaser on the terms fixed by the owner of the property, such purchaser being ready, willing and able to take a conveyance and pay the purchase price, has earned his commissions. *Monroe v. Snow*, 131 Ill. 126.

The fact that the contract in this case involved an exchange of lands does not change the rule announced. *Mechem on Agency*, Sec. 971. The case of *Wilson v. Mason*, 158 Ill. 304, does not abrogate this rule. That case goes merely to the extent of holding that where the only evidence of the willingness, readiness and ability of the proposed purchaser is found in an executory contract which is void by the statute of frauds, no commissions have been earned. *Hutten v. Renner*, 74 Ill. App. 124. There is nothing said in the *Wilson* case that leads us to the conclusion that the well-established rule of an ordinary real estate broker's contract laid down in the *Monroe* case, was intended to be abrogated. If appellants in the *Wilson* case, in addition to the written contract, which the court declared to be void as being within the statute of frauds, had been able to show that the purchasers found, were willing, ready and able to take the property, irrespective of the void written agreements, there is nothing in the reasoning of that case which leads us to believe that the court would, as a matter of law, have denied the brokers their commissions; but the contrary would seem to follow from the second paragraph of

the opinion. See *Holden v. Starks*, 159 Mass. 503, where this precise point seems to be ruled in favor of the broker.

The seventh proposition of law was to this effect:

"If the plaintiff agreed with the defendant to sell his real estate, or trade it for him, and upon so doing was to receive a commission for his services, the defendant had the right at any time, before the sale was completed or exchange made, to withdraw his offer to sell or trade, and plaintiff would not be entitled to commissions for his services."

This proposition is an attempt to enunciate a doctrine which is in direct conflict with the decision in the case of *Monroe v. Snow*, *supra*.

The court found that appellee had done everything that was required of him to complete the "trades" of appellant's lands. After that it can make no difference whether appellant did or did not complete the trades, provided, in the latter event, the appellee did not interfere to bring about that result or did not bring about the "trades" in the first instance by fraud, of neither of which circumstances is there any pretense. *Greene v. Hollingshead*, 40 Ill. App. 195; *Swigart v. Hawley*, *Id.* 610. The assignment of errors relating to the refusal to hold said propositions to be the law must be held not well taken.

The assignment of error which questions the rendition of the judgment against appellant must be sustained. Even if appellant, Adkinson and Green agreed to trade, still, before appellee is entitled to recover his commissions, he must show that the purchasers he found were able to make the exchange; and this ability was not proven by the mere production of deeds on their part, without some showing that they also had title to the properties they were willing to deed. The ability of Adkinson and Green did not depend upon general financial responsibility, but upon their being owners of the lands it was proposed to exchange. The element of ability is a part of the plaintiff's case. *Pratt v. Hotchkiss*, 10 Ill. App. 603; *Schmidt v. Keeler*, 63 Ill. App. 487; *Woolley v. Lowenstein*, 83 Hun, 155.

There is no evidence in the record which even remotely

City of Herrin v. Newton.

tends to show that the purchasers found were able to convey title to the lands involved in the exchange.

For the error indicated, the judgment of the Circuit Court of Jefferson County is reversed and the cause remanded.

Reversed and remanded.

City of Herrin v. Mary Newton.

1. INSTRUCTIONS—*Defective Sidewalks*.—An instruction by which the jury is told, in substance, that a municipal corporation is liable for such a defect only as a person exercising reasonable care can not avoid danger in passing over, is erroneous. The city is liable when reasonable care to avoid danger is used and damage ensues.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Williamson County; the Hon. ALONZO K. VICKERS, Judge presiding. Heard in this court at the February term, 1902. Affirmed. Opinion filed September 11, 1902.

SPILLER, FOWLER & WHITE, attorneys for appellant.

WILLIAM A. SCHWARTZ and DUNCAN & DENISON, attorneys for appellee.

MR. JUSTICE WORTHINGTON delivered the opinion of the court.

Suit by appellee to recover damages for a personal injury caused by a defective sidewalk in the city of Herrin, on September 22, A. D. 1900, while walking along said walk. Appellee alleges that appellant wrongfully and negligently suffered its sidewalk to become and remain in an unsafe condition, and divers planks of the walk to become and remain unfastened, and that appellee, while walking along said walk, using ordinary care for her own safety, was tripped by one of the loose planks flying up, by reason of a man, standing at the side of the said walk, placing his foot on one end of the loose plank; that appellee's foot was struck by the plank, or forced into the hole, thereby injuring her foot; that as a result of the injury, erysipelas

developed in her foot, and that appellee has suffered great pain and is permanently injured.

The plaintiff recovered judgment for \$1,000, from which judgment defendant appealed.

The evidence shows that appellee was injured by the uptilting of a loose plank in the sidewalk, caused by a man stepping on one end of the plank. There is no evidence of want of ordinary care on her part, nor is there any evidence tending to show that the plank was not loose, or that it did not tilt up and injure her as she testifies. The only remaining issue then, is the liability of appellant. That issue involves the following propositions: Had appellant exercised reasonable care to keep the walk in a reasonably safe condition, and had it actual notice, or had the walk been so long out of repair that it should have known of its defective condition. Upon all these questions there is a conflict of evidence. If the jury believed the testimony of appellee's witnesses, she was entitled to recover. This being so, it would serve no useful purpose to quote, analyze, and compare the conflicting testimony.

It was for the jury to weigh the evidence and say what it proved. While it does not clearly establish the liability of appellant, there is evidence which, if true, does prove its liability. This being so, the finding of the jury should not be disturbed.

Twenty-six instructions were asked by appellant, fourteen of which were given. Where so many instructions are imposed upon a court, it is not strange that errors occur in giving or refusing some of them. No fault is found with those given for appellee, but it is urged that the court erred in refusing certain instructions requested by appellant. The first refused instruction does not state the law correctly and is misleading. By it the jury is told, in substance, that a municipal corporation is liable for such a defect only, as a person exercising reasonable care can not avoid danger in passing over. If this means anything, it means that the corporation is only liable when a person can not avoid danger. This is not the law. It is liable when reasonable care to avoid danger is used, and damage ensues.

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The material part of refused instruction numbered 2, is found in number 5 and 6, which were given; and of number 9, in number 3 given. Number 10 should have been given, but its refusal is not reversible error, as the jury had been told in general terms in number 6, all that is embraced in number 10. The same is true of refused instructions number 11, and number 12. The jurors were fully instructed as to what the plaintiff must prove to sustain her case, and it would have been a repetition of the substance of other instructions, to tell them that the proof of the injuries alone would not warrant a recovery.

It is claimed that the court erred in not sustaining appellant's objection to the testimony of Odum and Dawson, as to the condition of the walk, on the ground that they could not tell what it was prior to the 22d of September, the date of the accident.

The abstracts show no exceptions taken when objections to the testimony of these witnesses were overruled, nor does it show that objections of the specific character mentioned by appellant, were made.

Finding no reversible error in the record, the judgment of the Circuit Court is affirmed.

Charles A. Schlueter v. Philip J. Leady.

1. **STATUTE OF FRAUDS—***Verbal Contract for Sale of Land.*—Where a verbal contract for the sale of land has been executed on one side, by the purchaser receiving a deed for the premises, the statute of frauds has no application, and the vendor may recover for the unpaid purchase money.

Assumpsit, upon the common counts. Appeal from the Circuit Court of Madison County; the Hon. MARTIN W. SCHAEFFER, Judge presiding. Heard in this court at the February term, 1902. Affirmed. Opinion filed September 11, 1902.

JOHN J. BRENHOLT, attorney for appellant.

DUNNEGAN & LEVERETT, attorneys for appellee.

MR. JUSTICE WORTHINGTON delivered the opinion of the court.

Suit in assumpsit upon the common counts. Verdict and judgment for plaintiff for \$992.66, from which defendant appealed.

The only issue of fact involved, as stated by appellant in his brief, is, "was there a sale of the real estate and personal property, and if so, what was the consideration for the same." Two juries, upon this issue, have found for appellee. It is not denied that there was a sale of a house and lot by appellee to appellant, and deeds executed for the same and accepted by appellant. The house was used for a boarding house, and the contention arises upon the question as to whether or not the furniture that was used for boarding house purposes in the house, was included in the sale, and if so, what price was agreed upon by the parties.

Appellee was indebted to a Mrs. Kirsch in an amount, as he testifies, from \$5,300 to \$5,400. To secure this, he had made a deed to her, taking back a bond for the reconveyance of the property if the debt was paid within three years, and paying her \$25 a month interest on the amount he owed her.

Appellee testifies that he sold the house and lot, with the furniture used in the boarding house, to appellant for \$6,500. He and Mrs. Kirsch executed deeds for the lot to appellant, the consideration named in the deed being \$5,507.34.

Anna Nulte and Catherine Duntschen, daughters of appellee, testify that they were present when the contract was made, and their evidence corroborates the testimony of appellee. Appellant denies positively that he bought the furniture.

Baker, a witness for appellant, testifies to preparing the deeds, acting for Mrs. Kirsch, and to the consideration of \$5,507.34 in the deed, which covered the sum owed Mrs. Kirsch and the expenses connected with the transaction.

George Gaiser, for appellant, testifies that about two weeks after the sale, he had a conversation with appellee,

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in which appellee said that he understood that "I was going to buy the place from Mr. Schlueter, and asked me if I wanted to buy the furniture."

Under this conflict of evidence, the conclusion of the jury upon the issue of fact, must prevail.

The general issue and the statute of frauds were pleaded by appellant. As the contract for the sale of the house and lot was completed by the delivery and acceptance of deeds, the statute of frauds is not a defense. In support of the plea of the statute of frauds, appellant cites *Prante v. Schutte*, 18 Ill. App. 64; *Meyers v. Schemp*, 67 Ill. 471; *Fleming v. Carter*, 70 Ill. 286.

These cases state the law correctly, as applied to the facts involved in them, but they are not in point when the facts in the case at bar are considered.

If there had been no transfer of the realty in the case at bar, the fact that there was a sale of personal property in connection with the sale of realty, would not have avoided the defense of the statute of frauds. It would still have been a valid defense in a suit to enforce a sale of the realty. This is the effect of the cases cited by appellant.

Judgment affirmed.

Manuel H. Boals v. Adam H. Bachmann et al.

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1. **SIDEWALKS**—*Whether Curbing is a Part of, is a Question of Fact.*—Whether a curbing in any particular case is a part of a sidewalk, is, in the first instance, a question of fact and not of law.

2. **TAX SALES**—*Judgment of County Court Conclusive.*—The judgment of the County Court against the owner of land, for taxes, where it has jurisdiction of both the subject-matter and of the owner, standing as it does in full force, is conclusive of the legality of the tax, for the purpose of fixing the basis for equitable redemption between the land owner and the tax sale purchaser.

3. **CLOUD UPON TITLE**—*Equitable Redemption to Remove.*—In order to have a cloud upon a title removed by an equitable redemption, complainant must tender or offer to pay the holder of the certificate the purchase money and all taxes he has paid, with the interest thereon, before he can have relief.

Bill to Enjoin Application for and Issuance of a Tax Deed.—Appeal from the Circuit Court of Madison County; the Hon. MARTIN W. SCHAEFER, Judge presiding. Heard in this court at the February term, 1902. Affirmed. Opinion filed September 11, 1902.

LEVI DAVIS, attorney for appellant.

The curbing is a part of the street, and it is not in the power of the city to impose the cost thereof as part of the cost of a sidewalk under the Sidewalk Act of 1875. *Job et al. v. The People ex rel.*, 193 Ill. 609.

McHALE & SUMNER, attorneys for appellees.

Where the owner of land seeks the aid of a court of equity to set aside certain tax sales as a cloud upon his title, alleging irregularities in respect thereto, the relief will be granted only upon equitable terms, as, that he shall pay to the holder of the certificates of such sales the amount expressed therein, together with subsequent taxes paid on the land by such holders. *Farwell v. Harding*, 96 Ill. 32.

The proper condition to be imposed upon setting aside a tax deed is to require the complainant to pay the amount paid at the sale, with all subsequently paid taxes and assessments, together with interest thereon at six per cent per annum. *Gage v. Waterman*, 121 Ill. 115.

A judgment confirming a special assessment can not be collaterally attacked except for matters going to the jurisdiction of the court to render judgment. *Johnson v. The People*, 189 Ill. 83.

MR. JUSTICE CREIGHTON delivered the opinion of the court.

This was a bill in chancery in the Circuit Court of Madison County, by appellant against appellees, to enjoin appellee Bachmann from applying for a tax deed, and to restrain appellee Riniker, as county clerk of Madison county, from issuing such deed. The court, upon final hearing, granted the prayer of appellant's bill, upon condition that he should pay appellee Bachmann the sum of \$235, with interest at the rate of five per cent per annum from the date of the decree, and pay costs; the \$235 being the aggregate of the amount paid by Bachmann at the tax sale,

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and for subsequent taxes, with legal interest thereon to the date of the decree. From this decree appellant appeals, and contends that the amount he is required by the decree to pay to appellee is inequitable.

Appellant owned 288½ feet of frontage on a certain public street in the city of Alton. The city council passed an ordinance requiring the construction of a brick sidewalk upon the street in front of appellant's and other properties. The walk to be eight feet wide, laid in the center of a strip of ground twelve feet in width, leaving two feet on either side of the walk, stone curbing to be put in along the sidewalk twelve feet from the property line; and that the same should be paid for by special taxation of the abutting property. The cost of such of the work as the city caused to be done in front of appellant's property amounted to the sum of \$124.60, and consisted of \$109.71 for the curbing and \$14.80 for brick work. A bill of the cost of this work, purporting to be a bill for the cost of sidewalk, was filed in the office of the city clerk. The city clerk made up a tax list and issued a warrant to the city collector. The sum assessed against appellant's property was not paid, and the city collector returned the warrant "no property found," and thereupon the city clerk made his report to the county collector, wherein appellant's property was reported delinquent. Due publication was made, appellant did not appear or present any objections, and the county clerk entered judgment against his property for \$126.13, which sum includes the interest and penalties provided by law. In due course and form appellant's property was sold and appellee Bachmann became the purchaser for the amount of the judgment, received a certificate of purchase therefor, and at the time appellant filed his bill herein had paid subsequently accrued tax in the additional sum of \$72.30.

Appellant's counsel contends that the curbing was not a part of the sidewalk, and therefore the item of the levy to pay its cost was illegal, and that because of such illegality it was error on the part of the Circuit Court to require appellant to repay that sum, with interest thereon, to appellee Bachmann.

Whether a curbing in any particular case is a part of a sidewalk, is, in the first instance, a question of fact and not of law. This question should have been raised by objection in the County Court, as was done in *Job v. The People*, 193 Ill. 609. At the time the County Court rendered the judgment in this case it had jurisdiction of both the subject-matter and of appellant, and its judgment, standing, as it does, in full force, is conclusive of the legality of the tax, for the purpose of fixing the basis for equitable redemption between the land owner and tax sale purchaser. In *Moore v. Wayman*, 107 Ill. 192, our Supreme Court says:

"If objections existed, they should have been made when application was made for judgment. It would be highly inequitable and unjust to permit owners to lie by and permit judgments to go against their land, a sale to be made, the land purchased, and the tax to be paid by the purchaser, * * * and compel him to sustain the loss. * * * Such injustice can not be tolerated by the courts. * * * If it (the bill) is placed on the ground that complainant may have the sale canceled by an equitable redemption to remove a cloud from the title, then it is the settled law of this court that complainant must tender or offer to pay the holder of the certificate the purchase money and all taxes he has paid, with the interest thereon, before he can have relief."

To the same effect are *Gage v. Waterman*, 121 Ill. 115; *Phelps v. Harding*, 87 Ill. 442; *Farwell v. Harding*, 96 Ill. 36; *Reed v. Tyler*, 56 Ill. 288; *Reed v. Reber*, 62 Ill. 240; *Barnett v. Cline*, 60 Ill. 205. Many other cases might be cited. The requirement is based upon the fundamental rule that he who seeks equity must do equity. The case of *Miller v. Cook*, 135 Ill. 190, cited and relied on by counsel for appellant, is not applicable. The controversy in that case was between a mortgagee and a tax sale purchaser, and not between a land owner and such purchaser. The County Court had no jurisdiction of the person of the mortgagee when it rendered the judgment and entered the order of sale. And in that case the tax sale purchaser had notice before he purchased that a portion of the tax included in the judgment had been paid, and that another portion was

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illegal. The mortgagor was insolvent and the mortgaged premises were not worth the amount of the debt and interest. The case being in equity the court applied equitable principles to the particular facts of that particular case, as did the learned chancellor of the Circuit Court in the case at bar. We find no error in this record. The decree of the Circuit Court is affirmed.

J. W. Childress v. The People ex rel., etc.

1. INSTRUCTIONS—*Stating Weight to be Given to Testimony of Witnesses.*—An instruction in a bastardy proceeding which states that the mother of the bastard child is most likely to know who its father is, and when it was begotten, and that whether her testimony is entitled to greater weight depends upon the degree of fidelity with which she adheres to the truth, and that this may be determined from all the evidence in the case, is vicious and misleading. The jury should be left free to determine what is the proper weight to be given to the testimony of each witness in each particular case.

Bastardy Proceedings.—Appeal from the County Court of Lawrence County; the Hon. J. D. MADDING, Judge presiding. Heard in this court at the February term, 1902. Reversed and remanded. Opinion filed September 11, 1902.

HUFFMAN & MESERVE, attorneys for appellant.

GEORGE W. LACKEY, state's attorney, and GEE & BARNES, attorneys for appellee.

MR. JUSTICE CREIGHTON delivered the opinion of the court.

This was a proceeding under the bastardy act, on relation of Francis Pearl Snyder, charging appellant with the paternity of her bastard child. Trial in the County Court of Lawrence County. Verdict finding appellant guilty. Judgment on the verdict.

The issue of fact was sharply contested and the testimony was directly conflicting. The relatrix testified that appellant was the father of her child; that he commenced having sexual intercourse with her the first of December, 1900,

and kept it up to the first of the following August, and that her child was born November 2, 1901. Appellant testified that he was not the father of relatrix's child, and that he had never at any time had sexual intercourse with her. While the testimony of other witnesses discloses some corroborating facts and circumstances *pro* and *con*, the testimony of relatrix and appellant was the only direct evidence as to sexual intercourse between them. The state of evidence was such as might have warranted the jury in finding appellant guilty, if they believed from the evidence, when tested by proper rules, that he did have sexual intercourse with relatrix, as she testified, and it goes without saying that they could not, under any circumstances, be warranted in finding him guilty if they believed from the evidence that he had never at any time had sexual intercourse with her, as he testified. The case having gone to the jury in this state of evidence, the court, at the instance of appellee, gave the following instruction:

"Second. This prosecution is a mere civil proceeding, and both parties are entitled to testify, and the mother of the bastard child is most likely to know who its father is, and when it was begotten, and whether her testimony is entitled to greater weight depends upon the degree of fidelity with which she adheres to the truth, and this may be determined from all evidence in the case. And in this case, if you believe from a preponderance of the evidence that Pearl Snyder is an unmarried woman, and has been delivered of a bastard child, and that the defendant had sexual intercourse with her at the time the said child was begotten, then the jury would be warranted in finding him to be the father of the child, although he may have testified that he did not, if the facts and circumstances proved on the trial lead you to believe that he did have intercourse with the said Pearl Snyder, and begot the child."

This instruction is vicious and misleading, and especially so when applied to such state of evidence as this record discloses. An instruction, in substance the same as this, was condemned in *Heindselman v. The People*, 52 Ill. App. 542. In *Jones v. The People*, 53 Ill. 366, cited and relied

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on by counsel for appellee, no such instruction was involved, and the court did not lay it down as law to be given to a jury as a rule to govern them in weighing evidence, that "the mother of a child is most likely to know who its father is." The court only, in substance, said, by way of answering the argument of appellee's counsel as to a question of fact, "although, etc." The jury should be left free to determine what is the proper weight to be given to the testimony of each witness in each particular case.

The evidence in this case is so conflicting and contradictory as to bring the case within that class which requires that to sustain a verdict in favor of the successful party, the instructions given on his behalf must be substantially correct and free from any error that might mislead the jury. The instruction complained of here does not meet these requirements.

The judgment of the County Court is reversed and the cause is remanded.

Eugene Hartrich et al. v. George Hawes.

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1. MASTER AND SERVANT—*When Knowledge of Defects in Machinery Will Not Preclude Servant from Bringing Action.*—A servant can recover for an injury suffered from defects due to the master's fault, of which he had notice, if under all the circumstances, a servant of ordinary prudence, acting with such prudence, would, under similar conditions, have continued the same work under the same risk, but not otherwise. All the circumstances must be taken into account, and not merely the isolated fact of risk.

2. SAME—*Neglect of Servant a Question of Fact.*—Negligence on the part of the servant, in such cases, does not necessarily arise from his knowledge of the defect, but is a question of fact to be determined from such knowledge and other circumstances in evidence.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Jasper County; the Hon. WILLIAM M. FARMER, Judge presiding. Heard in this court at the February term, 1902. Affirmed. Opinion filed September 11, 1902.

DAVIDSON & ISLEY, and I. D. SHAMHART, attorneys for appellants.

FITHIAN, KASSERMAN & FITHIAN and GIBSON & JOHNSON, attorneys for appellee.

MR. JUSTICE WORTHINGTON delivered the opinion of the court.

The judgment in this case might be affirmed for the failure of appellant to comply with rule 23, which requires that "a party bringing a cause into this court shall furnish a complete abstract or abridgment of the record thereof."

The pleadings are not abstracted at all, nor are the special findings asked by defendants presented in the abstract; nor the reasons filed for a new trial; nor the errors assigned on the record.

Appellants operated a large sawmill, employing fifteen to twenty hands. Appellee had been in their employ for two or three years as a common laborer or "roustabout," as he terms it, doing whatever he was ordered to do. At the time of his injury appellants were not at the mill. There is a conflict in the evidence as to whether, in the absence of appellants, there was any foreman, or employe authorized to give orders. If there was any such, it appears to have been one Sam Frauli. Appellee testifies, "Mr. Frauli was the foreman when they (the defendants) wasn't here; he was the head sawyer." Frank Bagwell testifies, "Guess Frauli was running the planer that day; neither of the defendants was there; guess Frauli was acting as foreman." Charles Sanger testifies, "Starks had authority to direct the hands. Frauli did for some time; if there was nobody else there and somebody had to, I suppose that he had authority." It appears that Starks was not there on the day of the accident. Appellants denied that Frauli had authority to act as foreman, but the evidence indicates that he had charge of affairs when the accident occurred.

Some of the machinery of the mill was below its floor. A part of it was shafting and a belt, thirty-six feet long, on pulleys, operating an elevator to clear away the saw dust as it accumulated. This belt was old, pieced, spliced, raveled and unsafe, and had been so for a considerable space of

time. There is ample evidence from the circumstances detailed, from which to infer that appellants knew, or ought to have known of its condition. Appellee also knew that it was pieced and spliced, but testifies that he did not know before the time of his injury, that it was so much raveled. It frequently slipped off the pulleys. When this occurred, some one would give notice by crying "Elevator," when it would be replaced, sometimes by one and sometimes by another employe. Appellee had replaced it at different times. Upon the day in question, the cry of "Elevator" was given and appellee went down to see what was the matter. He found the belt broken, and came back and reported to Frauli, who, with appellee, went down to mend it. As we understand from the evidence, the belt was off the pulleys and resting on the shaft, and when appellee brought two ends together and was holding them while Frauli was commencing to splice the ends, a raveling of the belt caught on the shaft, and the belt was started in motion, drawing both of appellee's hands around the shaft and so crushing them and his forearms, that both arms had to be amputated a few inches below the elbow. The trial resulted in a verdict and judgment against appellants for \$1,250, from which they appealed.

Counsel for appellants say in their brief that they insist upon all the errors assigned, but further state that they will make no further reference to them except as involved in these four propositions: First, the court erred in not directing a verdict for the defendants. Second, the court erred in refusing to give the instructions as asked by appellants. Third, the court erred in giving instructions asked by appellee. Fourth, the court improperly admitted evidence in rebuttal which, if admissible at all, should have been offered and admitted in chief.

To the last of these propositions it is sufficient to say, that it is discretionary with the court to admit testimony for the plaintiff after the defendant has concluded his evidence, which should have been offered in chief. This discretion does not appear to have been abused in the present instance, and there was no error in its exercise.

There was evidence tending to sustain the verdict. It has so impressed two juries who have found for the plaintiff. There was no error, then, in refusing the peremptory instruction to find for defendants. The remaining two propositions may be considered together, as they involve the qualification of defendants' instructions that plaintiff could not recover if he knew the defective condition of the belt, so as to require also a knowledge of its risks or danger caused by the defect. We think that the modifications were proper. A servant may know that machinery is defective, and yet not know the danger or risk incurred in using such machinery. Such we understand to be the rule, and it is for the jury to determine from the evidence whether the person injured knew the danger and risk incurred. Counsel for appellants in their brief print parallel quotations from *Swift & Co. v. O'Neill*, 187 Ill. 343, and *L. E. & W. R. Co. v. Wilson*, 189 Ill. 98, and insist that these cases are inconsistent, and that the latter decision states the law correctly. It is said in *Swift & Co. v. O'Neill*, *supra*, citing other authorities :

"Hence, although he may know of the defects, yet unless, under all the facts and circumstances of the case, it can be said he knew of the extent of the danger, he may still maintain his action. That is to say, an employe may know of defects in such place or appliance and yet be justifiable in the belief that, by the exercise of proper care, no immediate danger from such defects will be incurred, and therefore his right of recovery not be defeated. 'The true rule, as nearly as it can be stated, is, that a servant can recover for an injury suffered from defects due to the master's fault, of which he had notice, if under all the circumstances, a servant of ordinary prudence, acting with such prudence, would under similar conditions have continued the same work under the same risk; but not otherwise. All the circumstances must be taken into account, and not merely the isolated fact of risk.' 1 *Shearman & Redfield on Negligence*, Sec. 211. 'Where the instrumentality with which a servant is required to perform a service is so glaringly defective that a man of common prudence would not use it, the master can not be held responsible for damages resulting from its use. But if a servant incurs the risk of machinery which, though dangerous, is not so much so as to

threaten immediate injury, or where it is reasonable to suppose it may be safely used with great skill or care, mere knowledge of the defect on the servant's part will not defeat a recovery. Negligence on the part of the servant, in such cases, does not necessarily arise from his knowledge of the defect, but is a question of fact to be determined from such knowledge and other circumstances in evidence.' 5 Rapalje & Mack's Digest of Railway Law, Sec. 352, *et seq.*, p. 208. See Huhn v. Missouri Pacific Railway Company, 92 Mo. 440, and authorities there cited. It is also said in note 1 to Sec. 211 of Shearman & Redfield, *supra*, 'It is generally a question for the jury whether the surrounding circumstances made it contributory negligence for the servant to continue using the appliances.'"

An examination of the decision in L. E. & W. R. R. Co. v. Wilson, *supra*, will show that it does not deny the rule as stated in Swift & Company v. O'Neill, but states that "the rule prohibiting a recovery when the servant knows of the defect, which the master had not promised to remove, does not rest upon the ground of contributory negligence, but upon his contract under which he entered the service of defendant. In such a case it is not a question of negligence on the part of the servant but of the risk assumed by him."

In Swift & Co. v. O'Neill, the question whether a servant is barred from recovery "on the ground of assumed risk," is said to be "based upon the rule that one can not recover for an injury to the incurring of which he has contributed by his own negligence." The apparent inconsistency is not as to the rule itself, but as to the grounds upon which it is based. The statement of the rule in the Swift case is not inconsistent with the decision in the Wilson case, the only apparent inconsistency being in the statements of the basis of the rule where the servant can not recover.

In the case at bar, the question as to whether appellee, knowing that the belt was defective, knew the danger therefrom when it was not running, and in process of repair, was a question directly and peculiarly for the jury to answer. The defects in the belt made it liable to break. Appellee may have known this. But the breaking of the

belt was the indirect, not the direct cause of his injury. When appellee was holding the belt for Frauli to splice, it was not running. The jury may have believed that a common laborer, or "roustabout" did not appreciate the danger of a motionless, dismounted, broken belt, resting upon a shaft, being caught on the shaft by a raveling of the belt, and made dangerous in this way. If the danger was apparent, it is fair to presume that Frauli, the head sawyer, and to some extent, at least, in charge during the absence of appellants, and who was with appellee, would have stopped the engine while they were repairing the belt, as he did stop it immediately after appellee was caught. It was for the jury, under all these conditions, to say whether appellee knew the risk incurred, and whether the danger was so apparent that no man of ordinary prudence would have incurred it. *Wierzbicky v. Ill. Steel Co.*, 94 Ill. App. 400; *The William Graver Tank Works v. O'Donnell*, 191 Ill. 236.

While the instructions for appellee which are criticised by counsel for appellants are in some respects open to criticism, we do not think that they show reversible error. The instructions as a series, presented the case fairly to the jury; and while it may be admitted that upon the facts it is a close case, we are not warranted in saying that the verdict is not supported by the evidence.

Judgment affirmed.

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Illinois Central R. R. Co. v. Henry J. Leiner, Adm'r.

1. **WILLFUL NEGLIGENCE**—*Defined*.—The true conception of willful negligence involves a deliberate purpose not to discharge some duty, necessary to the safety of the person or property of another, which duty the person owing it has assumed by contract, or which is imposed upon the person by operation of law. *Thompson's Commentaries on the Law of Negligence*, Vol. 1, Sec. 20.

2. **SAME**—*High Rate of Speed*.—Running a train at from fifteen to eighteen miles an hour in a place where there was, to the knowledge of defendant's servants, likelihood of a prior occupancy by another train,

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can with full propriety be called a willful determination not to perform a known duty, particularly when the engineer knew that he had a heavy train pulled by two engines and that he was running on a down grade.

8. *PRACTICE—General Issue Admits Sufficiency of Counts of the Declaration.*—By pleading the general issue, or not guilty, which is the same thing in substance, the defendant admits the sufficiency of the counts of the declaration, and he can not afterward question them by motion to exclude the evidence. If the counts were bad, the defendant should either demur to them or move in arrest of judgment upon them.

4. *SAME—One Good Count Sufficient.*—Whenever an entire verdict shall be given on several counts, the same shall not be set aside or reversed on the ground of any defective count, if one or more of the counts in the declaration be sufficient to sustain the verdict.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of St. Clair County; the Hon. WILLIAM HARTZELL, Judge presiding. Heard in this court at the February term, 1902. Affirmed. Opinion filed September 11, 1902.

Statement.—Appellee brought this action on the case against appellant, to recover of it, damages, for negligently causing the death of appellee's intestate. The case was tried by a jury, who returned a verdict for the plaintiff below for the sum of \$5,000, on which the court rendered judgment, after overruling a motion by appellant for a new trial, and also a motion by it to arrest the judgment, to each of which rulings defendant excepted and has brought this appeal.

The substantive facts of the case are: William A. Wing, the deceased, was a freight conductor on appellant's railroad, and resided at Sparta, in Randolph county, about forty miles southeasterly from East St. Louis. The end of his run, where he took his train and to which he brought it, was East St. Louis.

In the early evening of Saturday, January 11, 1901, after he had brought his train into East St. Louis, at the end of his run for that day, he desired to be relieved and go to his home, and it being the custom of the railroad company to furnish its employees free transportation in such cases, he applied to the telegraph operator at East St. Louis, to get him a telegraphic pass to Coulterville, a short distance

from Sparta. The dispatch for a pass had to go to the trainmaster's office at Carbondale, and on account of a change of operators at East St. Louis in the evening, the pass did not get into the hands of deceased until 8:58 P. M. It directed the conductor of train No. 203, to "carry conductor Wing, East St. Louis to Carbondale, and get regular transportation at my office," and was properly signed. Train No. 203 was a regular passenger train which left the relay station at 9:04 P. M., but for some unexplained reason, Wing did not take it, but instead he went to the conductor of freight train No. 255, which was scheduled to leave East St. Louis for Carbondale at 10 o'clock P. M., and which was not allowed by the rules of the road to carry him, except by special permission of the division superintendent. He told the conductor that he had transportation to ride on his train to Coulterville. The conductor told him to go to the caboose and "make himself comfortable," and he would wake him up at Coulterville.

After the train was ready to start, the conductor went to the caboose and found the deceased asleep. He continued to sleep until the train reached Belleville at 3:20 A. M., January 12th. The conductor did not ask him for his transportation, as he did not desire to disturb him. The train was a long, heavy one, and the conductor and engineer knew before leaving East St. Louis, that an extra freight train was to leave that city and follow No. 255, at 2:30 of the morning of the 12th. Train No. 255 was compelled to double the hill between East St. Louis and Belleville, and on account of the delay, the water in the engine was exhausted and the engineer was compelled to leave his train before arriving at Belleville and go there for water. Two or three minutes before the train stopped at Belleville depot, the conductor, who was riding in the caboose with one W. E. Ring, his rear brakeman, and deceased, informed the brakeman of the 2:30 train that was to follow them and directed him to keep his "eyes open," and the conductor then went forward, on the top of the train. As soon as the train stopped the conductor and engineer

went into the office to get orders and sign the register. After they received their orders and were in the act of starting, at 3:40 A. M., their train was run into by the extra train, and brakeman Ring and conductor Wing were instantly killed. The extra train was long and heavy, and drawn by two engines.

When the extra train reached the crown of the hill, about three hundred feet from the city limits, it was running at the rate of about thirty miles per hour. As soon as it started down grade the engineer in charge of the front engine, and who had control of the train, applied the air brakes and continued to make such applications until the engine reached Centreville avenue, about fifteen or sixteen hundred feet from train 255, when the engineer discovered that there was a train standing on the track. The train was then running at the rate of about twenty miles per hour; he immediately reversed his engine, continued to apply the air brakes and whistled for the hand brakes to be applied. The conductor in charge of the train at once applied the hand brakes. They were, however, unable to prevent a collision. The train was running at the rate of fifteen miles an hour when the collision occurred. The grade from Centreville avenue to the depot was about one per cent. On account of a curve in the track a train coming from the northwest can not see a train standing at the depot until it reaches Centreville avenue. The rules of the company provide that when a train is detained at a station for more than ten minutes, where the rear of the train can not be plainly seen from a train moving in the same direction for a distance of one-half mile, a flagman must go back a distance of 3,600 feet and protect the train.

Rule B 8 provides, "Second and inferior class trains must run carefully through the yard limits at Belleville, expecting to find main track occupied. In case of accident, the responsibility rests with the approaching train." Extra trains are of inferior class.

The ordinances of the city of Belleville provide that freight trains shall not be run through the city at a greater rate of speed than six miles per hour.

Train No. 255 did not flag the extra train. The usual running time of freight trains from East St. Louis to Belleville is one hour. The city of Belleville contains 20,000 inhabitants. It is 4,157 feet from the Belleville & Southern depot, where the collision occurred, to the western limits of the city, in the direction of East St. Louis. From these limits to this depot, there is a fall in grade of over thirty-nine feet. At 1,523 feet west of the depot, there is a sharp curve in the road and on account of this curve and the houses adjacent thereto, it is impossible to see a train at the Belleville & Southern depot, until the curve is reached. There is a fall of one foot in each 100 feet, from the curve to the depot. The Belleville & Southern Railroad is operated by appellant, as a part of its system.

KRAMER, CREIGHTON & SHAEFFER, attorneys for appellant; JOHN G. DRENNAN, of counsel.

M. W. BORDERS, attorney for appellee.

MR. PRESIDING JUSTICE BIGELOW delivered the opinion of the court.

The declaration contains ten counts but none of the counts were demurred to, and by defendant's plea of not guilty, issue was joined on all the counts, and at the close of the evidence, appellant's counsel moved the court to exclude all of the evidence from the jury and to instruct the jury to return a verdict finding the defendant not guilty, but the court denied the motion and the defendant excepted.

Appellant's counsel have assigned nine errors on the record, but the principal error that has been argued, is the refusal of the court to take the case from the jury, by directing it to find the defendant not guilty.

That the railroad company had the right to classify its trains and exclude all persons from riding on its freight trains without a special permit by an officer of the company, can not be denied, and that deceased knew that the pass he had received did not authorize the conductor of

freight train No. 255 to carry him to Coulterville or any other station, and hence that he was wrongfully on the train where he met his death, can scarcely admit of a doubt, whatever may be said of his intention, or of the intentions of the conductor of the train on which deceased was riding.

Rules in regard to the management and running of railroads, like the laws enacted by the state, must be obeyed, or anarchy and destruction speedily follow; hence we are unable to hold that the judgment can be sustained on any of the counts in the declaration in which it is not alleged that deceased's death was caused by the reckless, wanton and willful acts of the servants of appellant; and this brings us to the real question litigated in the case.

It is alleged in the first count of the declaration that the servants and employes of defendant in charge and control of the train on which deceased was riding, well knowing that he was there, "carelessly, negligently, recklessly and wantonly failed and omitted to flag and stop" the extra train, and that the extra train was negligently, recklessly and wantonly, run and driven at a high and dangerous rate of speed, to wit, "thirty miles an hour," into the yard limits of the defendant and within the limits of the city of Belleville, in violation of good railroading, and the rules of the defendant, and of an ordinance of the city, and that in consequence of the gross negligence, recklessness and wantonness of the defendant's servants in charge of the two trains, the trains collided and killed deceased.

The second count is substantially the same as the first count.

It is alleged in the third count that the servants and employes of the defendant in charge of the regular train, willfully failed and omitted to flag and stop the extra train, and that on account of the willfulness of defendant's servants in charge of the extra train in running and driving it in the yard limits of the city of Belleville at a high and dangerous rate of speed, in violation of the rules of the railroad, and of the ordinances of the city, the trains col-

lided, whereby deceased was killed, and that said willful acts directly contributed to his death.

Some of the remaining counts are substantially the same as the first two counts, but it is unnecessary to refer to them in further detail.

The chief difficulty in the disposition of this case relates to the question whether there is evidence tending to prove that the conduct of the defendant and that of its servants amounted to a willful injury, as we understand appellee's counsel it is conceded by him that deceased was to all intents and purposes, a trespasser on the train where he was killed.

The views of courts in different jurisdictions are not entirely agreed upon what constitutes a willful injury. In Alabama the view seems to be entertained that "an injury can not be said to be wantonly inflicted so as to obviate the effect of contributory negligence, unless the circumstances and conditions known to the person responsible for the act or omission complained of, are such as to make it likely or probable that his conduct will result in injury, and he consciously and wantonly does a wrongful act or omits to do a proper and necessary act." Thompson's Commentaries on the Law of Negligence (2d Ed.), Vol. 1, Sec. 208. And something of this view of the law was applied in the case of *C. & W. I. R. R. Co. v. Surowieski*, 67 Ill. App. 682, where the plaintiff attempted to climb between the cars of a train which blocked the crossing, and in the attempt was injured by the movement of the train; it was held that unless the defendant's servants knew that the plaintiff was in a dangerous position when the cars were moved, the conduct of the defendant could not be denominated reckless or wanton. But we do not understand from that opinion or from the decisions of our Supreme Court, that conscious and aggressive wrongdoing with respect to a known situation are the only distinctive ingredients in willful injuries. In a case where the locomotive of the defendant was run at a high and dangerous rate of speed, without headlight, without ringing the bell, and in a place

where numbers of people were likely to be, and injury resulted, the Supreme Court said :

“Such acts would be liable to the construction of being in wanton and willful disregard of the rights of the public generally, so as to amount, in law, to wanton and willful negligence. And it was not necessary, in order to raise an inference of such negligence, to prove that the defendant’s servants were actuated by ill-will directed specifically toward the plaintiff, or to have known that he was in such position as to be likely to be injured.” East St. Louis Connecting Railway Co. v. O’Hara, 150 Ill. 580.

In C. & W. I. R. R. Co. v. Surowieski, 67 Ill. App., *supra*, it is said that wantonness or recklessness is “such a disregard of duty, as evinces an utter indifference to duty or the rights of others.” Willful negligence has been defined by a learned text writer to be, “a willful determination not to perform a known duty.” Thompson’s Commentaries on the Law of Negligence (2d Ed.), Vol. 1, Sec. 21. Again, “The true conception of willful negligence involves a deliberate purpose not to discharge some duty, necessary to the safety of the person or property of another, which duty the person owing it has assumed by contract, or which is imposed upon the person by operation of law.” *Id.*, Sec. 20. And again: “An entire absence of care for the life, the person or the property of others, such as exhibits a conscious indifference to consequences, makes a case of constructive or legal willfulness, such as charges the person whose duty it was to exercise care, with the consequences of a willful injury.” *Id.*, Sec. 22.

Tested by these rules we are unable to say that the court erred in the refusal to take the case from the jury, or that the jury found wrongfully against the defendant on that part of the charge of the court, which, at the instance of the defendant, by its instructions submitted the question of the defendant’s willfulness to the jury. From the defendant’s own rules, it is manifest that the main track in Belleville is generally occupied, and rule No. B 8, is based upon a recognition of that fact. The engineer who controlled the train which committed the injury, testified that he knew

the rule; hence the inference is irresistible that he knew of the general conditions which necessitated the rule, that is, the fact of a likelihood that the track on which he was running was occupied. Under such circumstances the rule imposed the same duty that the law required; he "must run carefully through to yard's limits." The likelihood that the main track in the yards of Belleville would be occupied, had been brought to the engineer's attention both from his experience and from his knowledge of the rule above referred to. The evidence of the servants of the defendant is, that they were running thirty miles an hour, when they came within the limits of the city of Belleville, and at the time the injury was committed, the speed was fifteen to eighteen miles an hour, and such speed was only reduced to that point after the engineer had attempted to get control of the train while it ran from the curve in the track to where the collision occurred, some 1,500 or 1,600 feet. Such a speed maintained in a place where there was, to the knowledge of defendant's servants, the likelihood of a prior occupancy by another train, can, with full propriety, be called "a willful determination not to perform a known duty," particularly when the engineer knew that he had a heavy train pulled by two engines and that he was running on a down grade. In that connection reference is made to the fact that Ring, the brakeman on train No. 255, neglected to obey the rule which required him to flag when his train had been ten minutes at the station, thereby inducing the engineer to believe that there was a clear track. If the rules of the defendant have anything to do with the question at issue, then the engineer also knew that rule B 8 declared that "in case of accident, the responsibility rested with the incoming train." In other words, the absence of signals, whether lights or torpedoes, in this particular place, was in no sense an assurance that the track was clear. With or without signals, knowing the general condition of the track as to probable prior occupancy, it was his manifest duty to regulate his conduct as to the timely control of his train, with reference to that principal fact, for aught that is contained in the rules of the defendant.

It is, no doubt, to be admitted, that the engineer did everything in his power to stop the train and avert injury, and that he probably had reasonable grounds to believe that he would be able to stop the train after he became actively aware that there was impending danger. But when a person gauges a situation so closely, in a frequented place, that it becomes a matter of mere judgment with him whether he shall be able to perform a well known duty, such fact can not be accepted as more than a mere rebutting circumstance on the main issue of willful negligence. The constructive willfulness set in motion is operating, nevertheless, and the consequences are the same as if there was an unqualified intention to commit the particular injury.

It is not urged that the court committed any error in the admission or exclusion of evidence, nor is any complaint made of the giving of improper instructions on behalf of the plaintiff; since none were asked, none were given.

The defendant presented to the court twenty-three instructions, the first twelve of which were given as asked, and which put the law of the case intelligently, fairly and completely, before the jury. Of the remaining eleven, the thirteenth instruction, except as to numbers, is a sample of all the others, and it is as follows:

“13. The court instructs the jury to disregard the testimony as to the first count in the declaration.”

By pleading the general issue, (or “not guilty,” which is the same thing, in substance,) the defendant admitted the sufficiency of the counts of the declaration and he could not afterward question them by motion to exclude the evidence. If the counts were bad, the defendant should either demur to them or move in arrest of judgment upon them. *Chicago, Burlington & Quincy Railroad Company v. Warner*, 108 Ill. 538. The instructions were properly refused. Section 57 of the Practice Act is as follows:

“Whenever an entire verdict shall be given on several counts, the same shall not be set aside or reversed on the ground of any defective count, if one or more of the counts in the declaration be sufficient to sustain the verdict.”

Several of the counts of the declaration to which the evidence could apply, were certainly sufficient to sustain the verdict, and hence appellant's motion in arrest of the judgment was properly overruled.

We have fully considered all of the questions raised in the case, and find no error in the record for which the judgment should be reversed, therefore it is affirmed.

Baltimore & Ohio S. W. R. R. Co. v. Frank Greer.

1. *RES IPSA LOQUITUR*—*Requisites of Proof Where Rule Applies.*—Before the plaintiff can recover in a case where the rule *res ipsa loquitur* applies, he is required to prove some affirmative act or acts of negligence, by defendant, that was the proximate cause of the injury, or to prove that defendant had omitted to perform some duty that the law required of him, which omission was the proximate cause of the injury; until he has done that, defendant is under no obligation to prove anything.

2. *RAILROADS—Not Insurers of Employees.*—Railroad companies are not insurers of the lives and limbs of their employes while in their service any more than private individuals are. A brakeman of a railroad company assumes the risks and dangers incident to the business in which he is engaged, and while the company is bound to furnish suitable and safe machinery and appliances for his use, when this is done it is not responsible for an injury resulting from the breaking or failure of the machinery, unless it is shown that it has in some way or manner been guilty of negligence in regard thereto.

3. *MASTER AND SERVANT—Knowledge of Defects in Machinery Must be Brought Home to Master.*—If injury arises from a defect or insufficiency in the machinery or implements furnished to the servant by the master, knowledge of the defect or insufficiency must be brought home to the master or proof given that he was ignorant of the same through his own negligence or want of care, or, in other words, it must be shown that he either knew or ought to have known of the defects which caused the injury.

Trespass on the Case, for personal injuries. Appeal from the City Court of East St. Louis; the Hon. BENJAMIN R. BURROUGHS, Judge presiding. Heard in this court at the February term, 1902. Reversed. Opinion filed September 11, 1902.

Statement.—Appellee recovered a judgment against appellant, in the City Court of East St. Louis, for the sum

of \$1,999 damages, in an action on the case for injuries received by him in the railroad yards of appellant, at the city of Springfield in this State, whereby his left arm was crushed so as to render amputation necessary, about two inches below the elbow; and it is claimed by appellee that his injury was caused by the negligence of appellant.

Appellee was in the employ of appellant as a switchman in its yards at Springfield.

The yards contain seven switch tracks that connect with the main tracks of the road. These switch tracks are numbered from 1 to 7 inclusive.

About four o'clock in the afternoon of November 11, 1899, a switching crew of which appellee was one, and whose duty it was to couple and uncouple cars, were at work in the yards shoving two cars in front of the front end of a locomotive, from a main track along switch track No. 5, for the purpose of coupling to and switching out, a car, standing on the switch track, seventy-five or eighty feet from the point where track No. 5 connects with the main or lead track. The switch track was level, and the locomotive and the two cars being shoved by it, moved slowly along the track, appellee riding on the side of the front car, and when within a few feet of the car to which the coupling was to be made, he got off the car on which he was riding and walked along ahead of it, going east, as he states, "faster than the engine was coming." The cars to be coupled were old, foreign cars, with link and pin couplers; the link was in the foremost car being shoved, and appellee in stating how he came to be injured, in his evidence as abstracted says:

"I laid my pin over in the eye of the other coupler, and when the car came up I reached out and took hold of it with my left hand, and with the other I reached under the buffer blocks—it was my left arm—and took hold of my link to enter it into the draw bar, when I saw the draw bar in the standing car start back under the car; of course my first impression was to get away as quick as possible, to keep from getting killed, and I started to get away; they clean their engines there and let their injectors open, and

the overflow pipe had washed great holes in the track, and my foot kind of stuck in one of them and threw me off my balance; I threw my arm up in between, and the draw bar giving way, let the buffer blocks come together; it held me there, it seemed to me, a long time, probably two minutes; * * * the draw bar went back until the head of the pin was clear up against the wood of the car; he reversed his engine and give it steam and pulled it back off of me before I had room to get out. My arm was caught between the buffer blocks, an iron square that is fastened on the end of the car, probably eight inches long and six inches square, about eight inches from the draw head. The draw heads on this car projected out beyond the buffers or bumpers from two to four inches. The draw head is a metal concern that fastens the cars together; it has two springs, two follower plates and two draft sills and a stem and key. The stem is a long rod that goes through and back under the car to the back that the springs and follower plates fit on. This spring is a large coil spring with a small spring inside of it. The stem runs through the coil springs, then there is a follower plate in front and one behind and a key behind the back follower plate in the stem. The faces of the draw bar come together first when you are making a coupling if the draw bar is properly constructed. The follower plates and springs keep the draw bar from going back under the car. The buffers or bumpers are put in in case the train breaks in two and the cars run together; or in case of rough handling of cars, with heavy loaded cars, they cut them off and kick them in on a track where there are other cars standing, and they come down probably eight or ten miles an hour, and the buffer blocks come together, they will spring apart again; the force of the springs will open them again. The buffer blocks are put in to save the springs and the follower plates to some extent. In coupling cars if the draw bars are in good order and the springs and follower plate in good condition, the buffers should stand from four to six inches apart, because the draw bars are from three to four inches longer than the buffer blocks. These are old cars that have been run a long time. In making a coupling onto an empty car with one or two cars attached to an engine, coupling onto another single car standing on a level track and no brakes being set and the draw bars in good condition, the heads of these draw bars would come together, but the buffers would not; the strength of the springs would keep them apart.

B. & O. S. W. R. R. Co. v. Greer.

If two empty cars are coupled together and, after making the coupling, the buffers remain up against each other, the springs are either broken or the follower plates gone, because if they were not, the weight of the springs would throw them apart. There was no follower plates on that car that I was going to couple onto; had there been they would have sprung apart; he had to pull the slack off of them; if that draw bar had performed its ordinary and usual work, my arm would have been liberated from there; the springs and follower plates, if they were in proper condition and properly constructed, would have kept the buffer blocks from four to six inches apart; that would give me ample room for my arm; there was no follower plates in the car he came back against; there was nothing to spring the car away from me, consequently my arm remained fastened in there."

On cross-examination appellee testified as follows:

Q. "You did not see the follower plates at all, did you, with your eyes?" A. "No, sir."

Q. "You did not see whether they were there or not?" A. "No, sir."

Q. "You are telling the jury the follower plates were not there because the draw bar went back?" A. "That is the idea."

Q. "You did not see whether they were there or not?" A. "If they had been there, the draw bar could not have gone back."

Q. "You did not see whether they were there or not?" A. "No, sir; but I knew they were not there, because if they had been there the draw bar would not have gone back."

No other witness testified that there was any defect in the draw bar.

KRAMER, CREIGHTON & SHAEFFER, attorneys for appellant;
EDWARD BARTON, of counsel.

F. C. SMITH and M. MILLARD, attorneys for appellee.

MR. PRESIDING JUSTICE BIGELOW delivered the opinion of the court.

The ground on which appellee seeks to recover is stated in his declaration as follows:

"That the defendant negligently had and allowed the draw bar of a freight car to be defective, out of repair and insufficient, by certain means whereof, while the plaintiff was then and there endeavoring to couple said car to another car, with due care and diligence, the said draw bar broke, gave way and pushed back, and in consequence thereof, the plaintiff's left arm was then and there caught between the buffers of said car and so crushed and injured that amputation of the same became necessary."

At the close of the evidence in the case, appellant's counsel moved the court to exclude the evidence from the jury, and to instruct the jury to find the defendant not guilty, but the motion was denied and the instruction refused, to which rulings of the court appellant severally excepted; thereupon appellant moved the court to arrest judgment on the verdict of the jury, which motion was denied and defendant excepted, and now assigns as error the several rulings of the court, with other errors which it will be unnecessary to notice.

It is apparent that appellee had no knowledge of any defect in the draw bar, and the pretended knowledge he had was mere conjecture, and of no value whatever as evidence. The entire case of the plaintiff seems to have been tried upon the theory that all he was required to establish by evidence, was the fact that he was injured while endeavoring to couple cars on appellant's railroad, and that is all he has established. This is not a case where the rule, *res ipsa loquiter* applies, and before the plaintiff could recover, he was required to prove some affirmative act or acts of negligence, by appellant, that was the proximate cause of the injury, or to prove that appellant had omitted to perform some duty that the law required of it, which omission was the proximate cause of the injury; until he had done that, appellant was under no obligation to prove anything. *Sack v. Dolese et al.*, 137 Ill. 129.

Even if appellee had proven that the draw bar had become broken, which caused it to go back under the car, that would not of itself have been sufficient to base a recovery upon. Railroad companies are not insurers of the lives

and limbs of their employes while in their service, any more than private individuals are. A brakeman of a railroad company assumes the risks and dangers incident to the business in which he is engaged, and while the company is bound to furnish suitable and safe machinery and appliances for his use, when this is done the company is not liable for an injury resulting from the breaking or failure of the machinery, unless it is shown that it has in some way or manner been guilty of negligence in regard thereto. *DeGraff v. N. Y. C. & H. R. R. Co.*, 76 N. Y. (31 Sickles) 125.

The rule of law that applies to a brakeman applies equally to a switchman engaged in switching cars in a railroad yard.

The testimony of plaintiff's witnesses that in their opinion the reason the draw bar went back under the car and remained there was that the spring or springs of the draw bar were broken, or as some of them said were "weakened," was purely guessing and nothing else, and was not evidence at all, and the guessing was bad, as was shown by the evidence of the car repairer and his assistant, who inspected the draw bar a short time after the accident, and found it intact—no spring broken and no follower-plate broken or gone. The evidence of these witnesses is entirely uncontradicted and gives strong support to the theory of appellant's witnesses, that the bumpers of the cars came together because the cars were running on a curved track.

But if the plaintiff had proved that a defect in the draw bar caused the injury, that would not have been sufficient to entitle him to recover, for such a thing might well exist and appellant still be free from any negligence, if the defect was such that it could not have been discovered by a careful inspection of the draw bar; and the burden of proving that it might have been discovered by such an inspection, rested on the plaintiff. *Sack v. Dolese et al.*, *supra*.

An examination of that case, as well as the case of *DeGraff v. N. Y. C. & H. R. R. Co.*, above quoted, will dis-

close each to be a much stronger case for the plaintiff than the case we are considering, yet in the former case the court directed a verdict for the defendant, and in the latter case the court directed a non-suit, which is substantially the same as directing a verdict of not guilty. In the case of C. C. & I. C. Ry. Co. v. Troesch, 68 Ill. 545, in stating the duty of the master to furnish the servant with proper and sufficient machinery and implements, the court says:

"The cases in this state and sister states are, with great unanimity, to the effect, if injury arises from a defect or insufficiency in the machinery or implements furnished to the servant by the master, knowledge of the defect or insufficiency must be brought home to the master, or proof given that he was ignorant of the same through his own negligence or want of care, or, in other words, it must be shown he either knew or ought to have known, the defects which caused the injury."

Applying that rule to the facts in this case, wherein can it be said that appellant was negligent? The utmost that can be replied is, that appellant should have had the car inspected before attempting to couple to it. There might be some force in such a reply if appellee had inspected the draw bar, or had caused it to be inspected, and had found it broken, as he alleged in his declaration was the case; but he did nothing of the kind, nor did he examine, or have any other person examine to learn if a spring was weakened or broken, or a follower-plate was broken or gone. Nothing whatever is disclosed by plaintiff or his witnesses that shows appellant guilty of any negligence that contributed to the injury of appellee.

We adopt the language of Chief Justice Church in closing his opinion in the De Graff case, to wit:

"This accident was an unfortunate one, and the plaintiff received a severe injury in the service of the defendant without any apparent default of his, and while it is a case which should commend itself to the generosity of the employer, we think it can not be sustained without violating established principles of law."

The court erred in refusing to instruct the jury to find

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the defendant not guilty, and for that error the judgment of the City Court of East St. Louis is reversed.

Finding of Facts.—We find that appellant is not guilty of any negligence that contributed to the injury of appellee, for which this suit was brought.

Horace B. Dean et al. v. David B. Archer et al.

1. **INSTRUCTIONS**—*Real Estate Brokers' Commissions.*—An instruction which states that if the defendants employed the plaintiffs as their agents to negotiate the sale of the defendants' lands, and the plaintiffs undertook such employment, and were instrumental in bringing together the buyer and the defendants, then and in that case the plaintiffs are entitled, as a matter of law, to recover from defendants compensation for their services regardless of the fact that the defendants concluded the sale, is correct.

Assumpsit, for brokers' commissions. Appeal from the Circuit Court of Jefferson County; the Hon. EDMUND D. YOUNGBLOOD, Judge presiding. Heard in this court at the February term, 1902. Affirmed. Opinion filed September 11, 1902.

FARTHING & PEAVLER, attorneys for appellants.

WILLIAM T. PACE and G. GALE GILBERT, attorneys for appellees.

MR. JUSTICE CREIGHTON delivered the opinion of the court.

This was an action of assumpsit, in the Circuit Court of Jefferson County, by appellees against appellants, to recover commissions for services rendered as brokers or agents, in effecting a "trade" of real estate. Trial by jury. Verdict and judgment in favor of appellees for \$250.

The case, as stated by counsel for appellants, is: "Appellees brought this action in assumpsit to recover a commission thought to be due them from a certain trade of real estate between appellants and one Thomas, of Chicago. Appellees introduced evidence tending to show an employment, and tending to show that their efforts finally brought

the parties together, and the parties themselves reached an agreement and traded. Appellants contended on the trial of the case that if appellees were ever employed that authority was revoked in good faith, and that afterward through other influences entirely, appellants were induced to again take up the matter, and finally reached an agreement."

All these questions of fact were resolved, by the jury, against appellants, and the evidence abundantly sustains the verdict.

Appellants complain of the action of the trial court in excluding certain proffered testimony. The rulings of the court as to the statements which the witness Horace B. Dean was proposing to make when the court interposed to stop him, were not excepted to, and therefore can not be considered here. Appellants produced as a witness, a Mr. Kirby Smith, by whom they offered to prove certain conversations and transactions between appellants and Thomas in the absence of any of appellees, and also to prove by said witness that he had performed services contributing to the consummation of the trade. The court sustained objections to this evidence. In this there was no error. The proffered testimony was not material to any proper issue in the case. This evidence was offered in pursuance of the same theory of the law on the part of appellants' counsel that moves them in this court to contend that the trial court erred in giving the first instruction on behalf of appellees. That instruction is as follows:

"1. The court instructs the jury that if you believe from the evidence in this case that the defendants employed the plaintiffs as their agents to negotiate the sale of the defendants' land, and the plaintiffs undertook said employment and were instrumental in bringing together the buyer and the defendants, then, and in that case the plaintiffs are entitled, as a matter of law, to recover from defendants compensation for their services, regardless of the fact that the defendants concluded the sale."

The instruction states the law correctly, as applicable to the facts of this case. The same instruction was given by

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the trial court in *Henry v. Stewart*, 85 Ill. App. 170, and was approved by the Appellate Court. The case was appealed from the Appellate to the Supreme Court, where a direct attack upon this instruction was made by counsel. The court sets out the instruction in full in its opinion and holds it to be the law. *Henry v. Stewart*, 185 Ill. 448. This holding is supported by *Wilson v. Mason*, 158 Ill. 304, *Hafner v. Herron*, 165 Ill. 242, and other cases in both the Appellate and Supreme Courts of this State. The exceptions to the action of the trial court as to the other instructions complained of are not in any instance well taken. We find no material error in this record. The judgment of the Circuit Court is affirmed.

City of Kinmundy v. Otto Anderson.

1. MASTER AND SERVANT—*Limitation upon Rule that Servant Does Not Assume the Risk of Dangerous Machinery.*—While it is the law that a servant does not assume the risk of dangerous machinery, if he continues to work, relying upon the promises of the master to make it reasonably safe, it is subject to these conditions: First, that the danger is not so imminent, that a reasonably prudent man would not assume the risk; second, that he does not continue to work with the unsafe machinery, when a reasonable time has elapsed for its repair, the master having failed to keep his promise to make it safe. What is a reasonable time is for the jury to decide.

2. SAME—*Where Servant Assumes Risk.*—If it is made optional with the plaintiff to shut down the plant in case he thinks its operation dangerous, under such option, if he continues to operate the plant, it is at his own risk, and there can be no recovery for injuries received.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Marion County; the Hon. TRUMAN E. AMES, Judge presiding. Heard in this court at the February term, 1902. Reversed. Opinion filed September 11, 1902.

Suit by appellee to recover for personal injuries received while superintending the operation of the electric light plant of appellant, the injuries caused by the breaking of

a belt running from the drive wheel of the engine to the pulley on the dynamo.

The case was tried upon the second and third counts.

These counts allege that appellee was injured by reason of an unsafe and defective belt furnished by defendant, together with the close proximity of the pulleys on the engine and dynamo, and the failure of appellant to furnish an appliance called an "idler," to steady the motion of the belt and check its vibration. The declaration alleges that plaintiff had repeatedly notified defendant of the unsafe condition of the belt, and that an "idler" was required to make its use safe, and that defendant had repeatedly promised to supply an "idler." It alleges that plaintiff, relying upon said promises, continued to operate said plant for a reasonable time for defendant to fulfill its said promises, and that while so doing, and while plaintiff was inspecting the said belt, the belt broke and hit plaintiff, injuring him, etc.

Defendant pleaded the general issues. Verdict and judgment for plaintiff for \$3,200, from which defendant appealed.

T. E. MERRITT, CHARLES H. HOLT and L. M. KAGY, attorneys for appellants.

W. F. BUNDY and FRANK F. NOLEMAN, attorneys for appellee.

MR. JUSTICE WORTHINGTON delivered the opinion of the court.

Appellee was an electrician and engineer of ten years experience, and was superintendent of appellant's electric light plant, for lighting the city of Kinmundy. At the time of the accident it was not used for that purpose, but was operated to furnish light for pay to those desiring it.

The evidence sustains the allegations, that the belt was defective and unsafe, and that the "idler" was necessary to steady its motion, and that in consequence of such defective condition, and the absence of an "idler," the belt broke and injured appellee, as he alleges.

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The allegations that appellee repeatedly requested appellant to furnish an "idler," and notified appellant that it was dangerous to operate the plant without it, and that appellant promised to furnish one, are supported by the evidence.

A ninety-six-inch drive wheel had been substituted for a sixty-inch wheel. A twelve-inch link belt had been constructed by appellee out of the old ten-inch belt, and eight feet of new belt, to be used on this larger wheel. The belt was heavy. It sagged and flopped when in motion. To prevent this "flopping," the appliance designated as an "idler" was to be used. This widened belt was applied in January, and was used until the accident occurred, on March 18th following.

Appellee testifies, in substance:

"That he notified the city authorities of the flopping of the belt, and that it was dangerous, and requested that they should procure suitable appliance to stop its flopping; that he does not know the number of times he complained about it—the first time was the last part of February, or the middle of February—and that they talked with a machinist in Kimmundy in regard to making an idler; that the electric light committee did this in his presence. The machinist drew a plan to show what they needed. The committee promised that they would procure an idler or some other appliance. 'I told them that I considered it very unsafe to stay there, and that I wouldn't do it unless there was something done to stop that and make it safe. I relied on their promise to get a suitable appliance. They commenced at once about getting one. Mr. Rhoads refused, for some reason or other, to make the appliance. I went to Mr. Davis, one of the electric light committee, and said to him that I considered it very dangerous to try to pull our full load with that belt in the condition it was in, jumping and flopping. I wanted him to procure an idler to hold the belt steady. He said he would do it; that he would see the rest of the council and the committee, and bring it up before the council right away and see what could be done, and in a few days sent me to Centralia to see Mr. Benson in regard to getting one. The electric light committee sent me. I went to see Mr. Benson about the first of March, or the last of February. Mr. Benson

had nothing that was suitable for the purpose. * * * I stayed at work because I was satisfied they would comply with their promises.’”

In cross-examination appellee testified :

“I have been a practical experienced engineer and electrician for some time. * * * I am familiar with electricity, electric appliances, and electric machinery. I know to a certain extent when they are dangerous. As an experienced man I could tell very well whether they were safe or dangerous. I have had twelve or fifteen years experience as electrician and engineer. * * * It was several days before the first of March that I decided that I wanted an idler. They would have to get it from some party who deals in these things at St. Louis, Chicago, New York or Boston. It would take probably twelve or fifteen days to get one from St. Louis, according to whether they had one in stock or not. They said they would get something to prevent or stop the flopping of the belt and make it safe. That was all I complained of, yes, sir. This flopping and jumping had continued for a couple of months before I was hurt. The belt had been widened since January. The belt commenced jumping along in February. * * * I considered it dangerous the last part of February; it was dangerous from that, right along. I considered it dangerous the night I got hurt, but not any more so than at any other time. When I came in that evening I saw the belt flopping. I didn't think the belt was in immediate danger of breaking. I knew the flopping was a great strain to the belt. I knew they were trying to get the idler, but it wasn't there at present. I concluded to run without the idler that night. To the best of their promise it wouldn't be more than a day or two until it was there. I thought it might break; that it was dangerous, but a man wouldn't and couldn't think a belt would break at any special time. I thought it was dangerous at the time.”

The evidence of appellee shows that he operated the plant, knowing it to be, as he himself expressed it, “very unsafe.” This condition was apparent to him “several days before the first of March,” “about the middle or last of February,” as nearly as he can fix the date. It was then that he first complained to the mayor and electric light committee. According to his own statement, it would take from twelve to fifteen days to get an idler if procured from St. Louis, the

presumption being that it would take longer if procured from Chicago, Boston or New York. Appellee testifies "that the flopping and jumping of the belt," which made it dangerous, had continued for a couple of months. During this time, appellee continued operating the plant.

While it is the law that a servant does not assume the risk of dangerous machinery, if he continues to work, relying upon the promises of the master to make it reasonably safe, it is subject to these conditions: First, that the danger is not so imminent, that a reasonably prudent man would not assume the risk; second, that he does not continue to work with the unsafe machinery, when a reasonable time had elapsed for its repair, the master having failed to keep his promise to make it safe. What is a reasonable time is for the jury to decide. *Mo. Furnace Co. v. Abend*, 107 Ill. 51; *Ill. Steel Co. v. Mann*, 170 Ill. 208; *I. C. R. R. Co. v. North*, 97 Ill. App. 124.

If it was made optional with appellee to shut down the plant in case he thought its operation dangerous, under such option, if he continued to operate the plant, it would be at his own risk and there could be no recovery for injuries received. *Am. & Eng. Ency.*, Vol. 14, p. 858, Sec. 18.

If appellee was directed to shut down the plant if he thought it unsafe, and continued to run it knowing it to be unsafe, it is clear that he can not recover.

Appellee testifies, Record, p. 68:

"Q. You state to the jury if, when you told Mr. Davis that you wanted an idler or something to keep the belt from flopping, he didn't tell you to take no risk, if there was any danger to shut the plant down. A. He said for me not to run the arc lights but to keep the commercial lights running if possible.

Q. Did he tell you not to take any risk, but to shut the plant down if there was any danger? A. I don't remember him making any such statement.

Q. Do you say that Mr. Davis did not tell you to shut the plant down if there was any danger? A. He did after the belt got to flopping; I don't remember before that.

Q. Did Mitch Allen tell you the same thing? A. Well, I don't remember.

Q. Didn't Mr. Smith tell you the same thing? A. Not that I remember after the belt was repaired; before the repair work was done on the engine—yes, sir; before the engine was repaired, running at the speed it was and in the shape it was, I finally told them I was going to stop the plant, and Messrs. Mathews, Smith and Davis said if it was absolutely dangerous, to shut the plant down; then they got the repairs made on the engine. They never revoked that order to shut the plant down if it was dangerous that I know of. They always told me to keep the commercial lights running whether I did the arc lights or not; they didn't say anything about the danger part."

Davis, Smith and Allen were members of the electric light committee, whom appellee recognized as agents of appellant and with whom, according to his own testimony, he consulted, and complained to, in reference to the condition of the light plant.

Davis testifies that about a week before the accident, that appellee "sent Mr. Nevilles for me." "I went over and didn't like the way the belt was acting and told him (appellee) to take no risk, rather shut the plant down than run the risk."

T. M. Smith, an alderman and a member of electric light committee testifies:

"I was over there one night to see Mr. Anderson in regard to the street lights; the people were complaining a great deal and I talked with Mr. Anderson about it. He claimed he couldn't pull it on account of the way the belt was flopping. We were talking about an idler; he thought if he could get a tightener we could pull it all right. He was then pulling the commercial lights; I didn't like the way the thing was running and I told Mr. Anderson not to take any chances with it; better shut the thing down than to have an accident or get hurt."

Appellee does not deny this, but says he don't remember it.

A. M. Allen, an alderman and member of the electric light committee, testifies:

"While Mr. Anderson was employed there he had the full control of the electric light plant himself. The first time, I think, that I ever gave Mr. Anderson any instructions in regard to running the plant was just after they

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put the large drive wheel on. There was a rumor over town that the wheel was too large, or something, any way that it was dangerous. Mr. Benson had recommended it to us that it was safe and I and Mr. Anderson was over to the plant talking about the plant, and about what was being said about it and I told him: 'Now, Mr. Anderson, if you have got any fears about this wheel being dangerous, shut down the plant.' Afterward, when we were talking about the tightener, after the belt was widened, I told him if there was any danger of the belt breaking or anything, to shut down and take no risk. It was two different times in regard to the tightener, I expect about two weeks before the accident. * * * What I meant was, what I told Mr. Anderson was, that if he thought there was any danger to himself, to shut down."

The force of this testimony is sought to be weakened by statements of appellee's witnesses, that the order was to shut off the arc lights if it was dangerous, but to run the commercial lights if possible. But appellee in his testimony as to what Davis told him, does not so state the order. To the question, "Do you say that Mr. Davis did not tell you to shut the plant down if there was any danger," he answered, "He did after the belt got to flopping; I don't remember before that."

When a servant knowingly continues to work with dangerous machinery, relying upon the master's promise to repair, his right to recovery is based upon the presumption that the master has assumed the risk. But when the master notifies the servant not to continue, if there is danger, and the servant does continue, then the servant assumes the risk, notwithstanding the fact that the master has promised to remove the danger.

We think that there is a clear preponderance of evidence in this case, sustaining these two propositions: first, that appellee knew for two months before the accident, that it was very unsafe and dangerous to work near the belt without an "idler;" second, that appellee was notified to shut down the plant if he considered its operation unsafe. So finding, it follows that appellee assumed the risk of operating unsafe appliances and therefore can not recover.

The judgment of the Circuit Court is reversed.

The following finding of facts will be incorporated in the record: We find that appellee, knowing it to be unsafe and dangerous to operate the electric plant in its condition, continued to operate it, waiting for it to be repaired, and after having been told by appellant, through its authorized agents, to shut down the plant if he thought it to be unsafe, and therefore find that appellee assumed the risk of operating the plant in its unsafe condition.

H. H. Deemar et al. v. George A. Boyne et al.

1. *INJUNCTIONS—Bond Need Not be Required.*—Sec. 9 of Chap. 69, entitled Injunctions, provides that bond need not be required when, for good cause shown, the judge or master is of the opinion that the injunction ought to be granted without bond. The only exception to his provision is where the collection of a judgment is enjoined.

2. *SAME—De Facto Incumbent in Office—Equity Jurisdiction.*—A court of equity will not entertain jurisdiction for the purpose of enjoining a *de facto* incumbent in office from performing its duties. Such result must be effected by judgment of ouster in a quo warranto proceeding.

3. *QUO WARRANTO—Remedy to Eject Usurpers in Office.*—Where parties have never been elected officers, but have assumed to act in that capacity, quo warranto is the proper remedy to oust them from their usurpation.

Bill for an Injunction.—Error to the Circuit Court of St. Clair County; the Hon. WILLIAM HARTZELL, Judge presiding. Heard in this court at the February term, 1902. Reversed and remanded, with directions. Opinion filed September 11, 1902.

George A. Boyne, John J. Ard, Thomas Peet and Moritz Ochler, as complainants, presented their bill of complaint, praying that a temporary injunction be granted against the defendants, restraining them from maintaining an office or in any manner exercising jurisdiction as justices of the peace within the town and city of East St. Louis, St. Clair county.

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A temporary injunction was issued, which, upon hearing of the case, was made perpetual, as shown by the following extract from the decree :

"It is therefore ordered, adjudged and decreed by the court that the temporary injunction heretofore granted by this court on the 15th day of May, A. D. 1899, against the defendants H. H. Deemar, Philip Traband, James H. Wyatt and Andrew Touchette, restraining and enjoining each of the above named defendants from exercising any jurisdiction within or maintaining an office of a justice of the peace or police magistrate within the city of East St. Louis, Illinois, be and the same is hereby made perpetual. And the said defendants, H. H. Deemar, Philip Traband, James H. Wyatt and Andrew Touchette are each and all perpetually restrained and enjoined from exercising any jurisdiction within or maintaining an office within the town and city of East St. Louis, Illinois, and the said defendants are each and all perpetually enjoined from in any manner exercising the jurisdiction and duties of the justice of the peace or police magistrate within the said town and city of East St. Louis, Illinois."

To reverse this judgment and dissolve the injunction, defendants Deemar and Wyatt prosecute this writ of error. Traband and Touchette failed to answer, and the bill was taken as confessed against them, no evidence being heard in support of the allegations against them. Wyatt and Deemar demurred to the bill as follows:

"These defendants demur to said bill, and for cause of demurrer show that the complainants have not, in and by their said bill, made or stated such a case as entitles them in a court of equity to any discovery or relief from or against these defendants touching the matters contained in the said bill or any of such matters.

And for a further cause of demurrer these defendants show that the complainants have not, as appears by their said bill, made out any title to the relief thereby prayed, or any relief whatever, from these defendants.

That there is no joint cause for relief stated in the said bill of complaint in favor of the complainants."

The demurrer was overruled and separate answers filed, denying, in substance, the allegations of the bill. The answers also "assert and insist that the complainants have

not shown a cause of action, or any right to ask or have an injunction against defendants."

The bill alleges that complainants and John Driscoll and Patrick Kane are the only resident and elected justices of the peace in the town and city of East St. Louis; that although defendants are not residents and were not elected justices of the peace in and for said town and city of East St. Louis, yet they maintain offices, try cases, and assume to act as justices of the peace in said town and city; that this tends to confusion in appeals and to corruption in the administration of the law, and that complainants are entitled to the fees and emoluments of the offices of justices of the peace in said city and town.

TURNER & HOLDER, attorneys for plaintiffs in error.

MESSICK & CROW, attorneys for defendants in error.

MR. JUSTICE WORTHINGTON delivered the opinion of the court.

The temporary injunction was issued without bond. It is urged that this was error. Sec. 9 of Chap. 69, entitled Injunctions, provides that "bond need not be required when, for good cause shown, judge or master is of the opinion that the injunction ought to be granted without bond."

Section 8 of the same chapter states the only exception to this provision, and that is when the collection of a judgment is enjoined.

In the absence of anything appearing to the contrary, we must presume that "good cause" was shown to the judge who ordered the temporary injunction.

It is also urged that the affidavit was not sufficient and that it was made before one of the complainants.

Defendants having answered the bill after their demurrer was overruled, and the case having proceeded to a hearing, and the temporary injunction thereupon being made perpetual, we think they must be held to have waived these objections.

A graver question is presented by the bill itself. Its legal effect is to charge that defendants, without authority, have assumed to act and exercise the functions of justices of the peace in the city of East St. Louis.

In other words, it charges that, without right, they have usurped said offices; that they are in said city acting as *de facto*, but not *de jure*, justices of the peace.

It does not differ in character from a bill to enjoin a party from assuming to act as a public officer who has never been elected to such office, or whose term of office has expired. The fact that defendants may be *de jure* justices of the peace in one locality, does not affect the remedy against them if they assume to act in another locality where they are not *de jure* justices. We think *Burgess v. Davis*, 136 Ill. 576, is in point. It was a bill to enjoin defendant from collecting his salary as county judge, upon the ground that he had been appointed a trustee of the sanitary district of Chicago, and alleging that by the acceptance of such an appointment he had ceased to be county judge. In deciding the case, the court quotes from the quo warranto act, "that in case any person shall usurp, intrude into or unlawfully hold or execute any office, a petition may be filed," etc., and say :

"When an officer has originally been elected, or appointed in a legal or proper manner, his continued holding of the office may become unlawful by reason of subsequent occurrences. * * * Hence, under the statute as above quoted, the proper mode of proceeding against him is by quo warranto."

And again :

"The bill admits that the defendant was county judge *de facto* by setting up that he was claiming to act and acting as judge of said county court since said acceptance of said office as said trustee."

A court of equity will not entertain jurisdiction for the purpose of enjoining a *de facto* incumbent in office from performing its duties. Such result must be effected by judgment of ouster in a quo warranto proceeding. *Samuels v. Drainage Coms.*, 125 Ill. 540; *Sheridan v. Colvin*, 78 Ill.

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238; Delahanty v. Warner, 75 Ill. 185; People, etc., on relation of John King et al. v. Matteson et al., 17 Ill. 167; High on Injunctions, Vol. 2, Secs. 1312-1314.

If the allegations of the bill in the case at bar are true, defendants in error are *de facto* justices of the peace in East St. Louis, by maintaining offices there as justices, issuing writs, trying cases, administering oaths and taking acknowledgments. It was to prevent them from exercising these functions that the injunction was prayed and issued. If they had never been elected justices, but had assumed to act, as alleged in the bill, it is clear that quo warranto would have been the appropriate remedy, and that an injunction to prevent their so acting would not be sustained. By a parity of reasoning, if defendants were not elected in the town and city of East St. Louis, and were not on this account authorized to maintain their offices as justices, and to do business as such in East St. Louis, they were to this extent usurpers in office, and upon a proper showing would be ousted from their usurpation by a judgment in quo warranto.

For the reasons assigned, the judgment of the court is reversed and the case remanded, with directions to the Circuit Court to dissolve the injunction and dismiss the bill.

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Anna A. Kirkpatrick v. Modern Woodmen of America et al.

1. **FRATERNAL BENEFIT SOCIETIES—Who Is Eligible to Participate in Benefit Funds.**—Under the law of this state no person can be eligible to receive or participate in the benefit fund who does not bear to the deceased member some one of the relations provided for in the constitution or by-laws of the society, and these must be within the scope provided for or permitted by the statute of the state wherein the society was incorporated.

2. **SAME—Certificate Different from Ordinary Policy of Insurance.**—A benefit certificate in a fraternal benefit society differs from an ordinary policy of insurance, in that it speaks with reference to the conditions existing at the time of the death of the member whose life has

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been insured by it. A beneficiary named in a certificate of a fraternal benefit society organized under the statutes of the State of Illinois, or like statutes of other states, has no vested interest in such certificate, or in the fund provided for its payment, until the decease of the member whose death matures the certificate. The constitution and by-laws of the society and the statutes of the state must be construed with reference not only to the terms of the certificate, but to the status of the parties existing at the date of the death.

Bill of Interpleader.—Appeal from the Circuit Court of Madison County; the Hon. MARTIN W. SCHAEFER, Judge presiding. Heard in this court at the February term, 1902. Affirmed. Opinion filed September 11, 1902.

L. M. CONKLING, E. C. HAAGEN and JOS. V. E. MARSH,
attorneys for appellant.

JOHN G. IRWIN, attorney for appellees.

Payment of death benefits shall only be made to the families, heirs, blood relations, affianced wife of, or to persons dependent upon the member. The payment of such benefits shall be subject, in all cases, to compliance by the member with the contract, rules and laws of the society. Sec. 1, Act of 1893, Laws of 1893, p. 130; 2 Starr & Curtis, p. 2278, Sec. 253.

Fraternal benefit societies have no authority to create a fund for other persons than those included in the classes named. In such case the power of the corporation to issue the certificate and the power of the member to designate the beneficiary are controlled and limited by the statute. *Palmer v. Welch*, 132 Ill. 141; *Alexander v. Parker*, 144 Ill. 356; *Wallace v. Madden*, 168 Ill. 358; *Old People's Home v. Wilson*, 176 Ill. 97.

The contract is between the member and the society. The beneficiary has no vested right. *Voigt v. Kersten*, 164 Ill. 314; *Niblack's Mut. B. Soc.*, Secs. 201, 202.

MR. JUSTICE CREIGHTON delivered the opinion of the court.

This was a bill of interpleader in the Circuit Court of Madison County by appellee Modern Woodmen of America against appellant, and appellees Clark Kirkpatrick, Harry Kirkpatrick and Mamie Keller. The bill sets up

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that one William D. Kirkpatrick became a member of the Modern Woodmen of America on April 3, 1894, and received a benefit certificate in the sum of \$2,000, payable at his death to Anna A. Kirkpatrick, his wife; that on the 30th day of January, 1899, Anna A. Kirkpatrick procured a decree of divorce from William D. Kirkpatrick; that on the 30th day of January, 1901, William D. Kirkpatrick died intestate, leaving him surviving as his only heirs at law, his brothers, Clark Kirkpatrick and Harry Kirkpatrick, and his sister, Mamie Keller, and that said Anna A. Kirkpatrick also survived him; that at the time of his death he was in good standing in the society; that due and timely proofs of death were made, and that orator is liable on the beneficiary certificate held by him, in the amount therein, to the person or persons legally entitled to receive the same; that Anna A. Kirkpatrick claims and demands that payment shall be made to her as provided in the certificate, and the brothers and sister claim that because of her divorce she is not eligible to receive it, and demand that it shall be paid to them as the only legal heirs of deceased; and that orator has no interest in the matter or fund, other than its desire to pay the same to the person or persons legally entitled thereto; that it is in doubt as to whom it should pay and offers to bring the money into court, etc. The bill makes all the parties defendant and prays the court to order them to interplead. In pursuance of an order to that effect the society was permitted to pay the money into court, and the claimants were ruled to interplead.

The claimant Anna A. Kirkpatrick, sets up that she is the person named in the certificate as beneficiary; that at the time the certificate was issued she was the wife of the deceased member, William D. Kirkpatrick; admits that a decree of divorce was granted as charged, but denies its validity, and claims that she was the deceased member's wife at the date of his death, and further that if the decree of divorce shall be held valid that such decree does not bar her right to receive the fund. And by a subsequent amendment of her pleadings she sets up that after the decree of

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divorce was rendered and before the death of William D. Kirkpatrick, he sought and obtained from her a promise that she would remarry him, and that thereupon she became and at the date of his death was his affianced wife.

Claimants Clark Kirkpatrick, Harry Kirkpatrick and Mamie Keller set up that they are the only heirs at law of the deceased member in question; aver that the decree divorcing Anna A. Kirkpatrick from said member is a valid decree; that by reason of such divorce she became ineligible to receive the fund, and that by reason of her ineligibility, they, as the only heirs at law of the deceased member, are entitled to it.

Upon final hearing, the Circuit Court denied the claim of Anna A. Kirkpatrick and found and decreed in favor of the other claimants. Anna A. Kirkpatrick appeals the case to this court.

The evidence establishes the following facts: That at the time of issuing the beneficiary certificate in question, April 30, 1894, the claimant Anna A. Kirkpatrick was the wife of the member, William D. Kirkpatrick; that on the 30th day of January, 1899, she was by decree of court divorced from him; that the member did not at any time change or attempt to change the certificate so as to name another beneficiary; that he was in good standing at the time of his death; that the name of claimant Anna A. Kirkpatrick, designated as wife of William D. Kirkpatrick, stood in the certificate at the time of the death as the beneficiary; that the death occurred January 30, 1901, and that the other claimants sustained the relation of brothers and sister to deceased and were his only legal heirs. The claim that Anna A. Kirkpatrick was, at the time of the death, decedent's affianced wife, rests solely upon her testimony and her statement in an affidavit for continuance, that deceased had said he had effected a reconciliation with her, that they were re-engaged and were to be remarried in the spring of 1901. Her account of the alleged re-engagement is, that it occurred about the first of September, 1900, during a visit of about two hours at her house in St. Louis. As abstracted by her counsel, her summing up of what occurred is:

"He asked me what I thought of it. I said I had thought it over seriously and I was willing to remarry him if he got into some kind of business that was permanent where he could support us. He said he had several positions in view and as soon as he got into something, and got his affairs straightened up, which he could not do for a few months, he thought in two or three months, in March or April, we could be married again. That is about the substance of our conversation."

She says she saw him once after September 1, 1900, and that they corresponded, but she does not state that anything was said between them at the time she saw him on the subject of their proposed remarriage; nor does she produce the letters, or state that they contained any allusion to that subject.

The constitution and by-laws of the society, in force at the time Kirkpatrick became a member and at the time of his death, provide that "Benefit certificates may be made payable only to the families, widow, heirs, blood relations, affianced wife, or person dependent upon the member, and to such others as may be permitted by the laws of the State of Illinois, and whom the applicant shall designate in his application." And that "in the event of the death of any beneficiary prior to the death of such neighbor, and upon his failing to designate another beneficiary, then the amount to be paid * * * shall be due and payable * * * to the legal heirs of said neighbor." A member of the society is designated by the term "neighbor." The statute of this state, where the society was incorporated, provides:

"Payments of death benefits shall only be made to the families, heirs, blood relations, affianced husband or wife of, or to persons dependent upon the member."

The state of this record renders it wholly unnecessary for us to discuss or to determine what, under our statutes and the constitution and by-laws of the society, would be the rights of the legal heirs of a deceased member if contested by the society, when the beneficiary named in the certificate survives, but is ineligible to receive the fund. Here the fund is brought into court and the society concedes

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that the heirs may take it, in case the beneficiary named shall be found ineligible. As between claimants, in cases of this character, the eligible are always preferred over the ineligible. The status of all the claimants here, except Anna A. Kirkpatrick, is conclusively established; they are all eligible. The question then is, as to the eligibility of Anna A. Kirkpatrick. If she is eligible, her claim is superior and exclusive of all the others, for she is specifically named in the certificate.

Under the facts of this case and the law of this state applicable to such facts, no person can be eligible to receive or participate in the benefit fund, who did not bear to the deceased member some one of the relations provided for in the constitution or by-laws of the society, and these must be within the scope provided for or permitted by the statutes of the state wherein the society was incorporated. *Baldwin v. Begley*, 185 Ill. 180; *Old People's Home Society v. Wilson*, 176 Ill. 94; *Alexander v. Parker*, 144 Ill. 355; *Rockhold v. Canton Masonic Benevolent Society*, 129 Ill. 440.

A benefit certificate in a society of this character differs from an ordinary policy of life insurance, in that it speaks with reference to the conditions existing at the time of the death of the member whose life has been insured by it. A beneficiary named in a certificate of a fraternal benefit society, organized under the statutes of the State of Illinois or like statutes of other states, has no vested interest in such certificate or in the fund provided for its payment, until the decease of the member whose death matures the certificate. The constitution and by-laws of the society and the statutes of the state must be construed with reference not only to the terms of the certificate, but to the status of the parties existing at the date of the death. *Delaney v. Delaney*, 175 Ill. 187; *Voigt v. Kersten*, 164 Ill. 314; *Baldwin v. Begley*, 185 Ill. 180; *Order of Railway Conductors v. Koster*, 55 Mo. App. 186; *Union Mutual Ass'n v. Montgomery*, 70 Mich. 587; *Tyler v. Odd Fellows Mutual Relief Ass'n*, 145 Mass. 134.

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In *Order of Railway Conductors v. Koster*, above cited, the court says:

"A benefit certificate of this kind has some of the features of an insurance policy, but it also has its point of difference, and in the particular we are now considering, it is testamentary in its character. The rule of the law of insurance, that if one have an insurable interest at the date of the policy, the policy is not vitiated by termination of that interest, does not apply in a case like this. This act is testamentary in its character in the respect that it speaks at the death of the member. As long as the lady * * filled the description given in the certificate she was under its protection, but when she ceased to fill that description, her interest in the certificate ceased. On the death of H. H. Koster, the certificate, speaking for the first time, called for his wife, and there was none to answer."

In this case as in the case at bar, the certificate was made payable to the beneficiary by name, and her status given as "wife." The court in that case further says:

"But when the status of the beneficiary is (at the time) the main, if not the sole, inducement for the insurance, the name becomes a mere descriptive designation, and the object of the benefit is * * * in the person filling the particular status. * * * The wife * * * is the main designation of the beneficiary. * * * If there is no wife at the date of the death, the certificate lapses, unless another beneficiary has been substituted by the member, or by the laws of the order."

These authorities and the reasoning upon which the conclusions therein reached are based, clearly establish that the wife of a member of such society, named in the certificate as beneficiary, who at the time of the death of the member is divorced from him, is by reason of such divorce ineligible, and can not lawfully receive or participate in the fund.

Appellant's counsel contend that the decree divorcing her from William D. Kirkpatrick is invalid, and that notwithstanding such decree she remained, in fact, his lawful wife to the day of his death. The alleged irregularities which it is claimed render the decree invalid, if there be in fact such irregularities, were her own wrongful acts; but

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without discussing that feature, it is sufficient to say the decree is not void. It is *prima facie* valid, is at most only voidable, and can not be attacked collaterally, as is sought to be done here.

When the evidence in support of the claim that Anna A. Kirkpatrick was the affianced wife of deceased at the time of his death is fairly considered and weighed in the light of her previous conduct with respect to her relations to him, of her interest in the result of the suit at the time she testified, and of the fact that he was then dead, it proves at most, only a conditional promise on her part to remarry him—to remarry him “if he got into some kind of a business that was permanent, where he could support us.” The evidence does not show that he ever afterward got into any kind of permanent business, or that the conditions which she imposed were ever waived by her. If it can be assumed that she could in any event be his affianced wife within the meaning of the statute and by-laws as between herself and the society, without his ever having in any way so designated her to the society, or so recognized her in his dealings with it, still such a conditional promise on her part as the evidence here disclosed, falls far short of establishing the status.

We find no error in this record. The decree of the Circuit Court is affirmed.

Swift & Company v. Patrick Ronan.

1. MASTER AND SERVANT—*What Risks Servant Assumes.*—The rule that the servant assumes the ordinary risks incident to the business, presupposes that the master has performed the duties of caution, care and vigilance which the law casts upon him. It is those risks alone that can not be obviated by the adoption of reasonable measures of precaution that the servant assumes.

2. SAME—*What Risks the Servant Does Not Assume.*—The law is that the servant does not assume risks that are unreasonable, or extraordinary, nor risks that are extrinsic to the employment, nor risks of

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the master's own negligence. The master's own duty to the servant is always to be performed. The neglect of that duty is not a peril which the servant assumes.

3. *SAME—Whether Risks Are Assumed by Servant is a Question of Fact.*—Whether the risks, in any particular case, are the ordinary risks which the servant assumes, is a question of fact to be determined by the jury from the evidence in the case, under the instructions of the court.

4. *SAME—Duty to Furnish Reasonably Safe Place to Work is a Continuing Duty.*—It is the duty of the master, in the first instance, to furnish the servant a reasonably safe place to work; and it is a continuing duty, which is not discharged if the master, by subsequent negligence, makes such place unsafe.

5. *SAME—Independent Contractors.*—The master is not liable for injuries caused to a servant through the negligence of an independent contractor.

6. *COMMON CARRIER—Defined.*—A common carrier is one who plies between certain termini, and openly professes to carry goods for all such persons as choose to employ him.

Action on the Case, for personal injuries. Appeal from the City Court of East St. Louis; the Hon. SILAS COOK, Judge presiding. Heard in this court at the February term, 1902. Affirmed. Opinion filed September 11, 1902.

This was an action of trespass on the case brought by appellee against appellant, to recover damages for personal injuries received by plaintiff by reason of the alleged negligence of the defendant while in its service.

A trial was had which resulted in a verdict finding the defendant guilty and assessing the plaintiff's damages at \$2,500.

A remittitur of \$500 was entered by appellee, whereupon the court rendered judgment on the verdict for \$2,000, from which the defendant appealed.

Appellant operated an extensive slaughtering and packing plant near East St. Louis. It was inclosed by a high fence. Inside the inclosure were railroad tracks, cars, buildings, etc. One of these buildings was a large packing house, with a platform in front, and a track parallel and adjacent to the platform. At the time of his injury, appellee was employed as a laborer, in a refrigerator car standing on said track in front of the platform, placing salt, with a shovel, upon pieces of meat as they were stacked in the car.

Other cars were on the track. A locomotive engine belonging to the St. Louis National Stock Yards Company and then employed by appellant and operating inside of its inclosure, forcibly struck one of these cars standing on the same track. The impetus of the contact was communicated through other cars until it reached the said refrigerator car, forcibly and suddenly propelling it three or four feet, and thereby throwing appellee against the handle of the shovel which he was using, thereby producing an inguinal rupture on his right side.

The declaration contains one count. After the usual formal allegations of ownership, user, etc., and the employment of plaintiff as a laborer, it charges that it was the duty of appellant to provide a reasonably safe place for plaintiff to work in, and that while he was in the discharge of his duty in said car, and exercising ordinary care and diligence, the defendant wrongfully and negligently caused or permitted a locomotive engine to be backed or run on the track and against cars standing thereon some distance from the refrigerator car, and drove them with great force and violence against the refrigerator car, in which plaintiff was at work, and thereby threw him with great violence against the shovel and the truck, and then against the jamb of the door, and in the jerk and fall the plaintiff was strained and ruptured, and permanently injured, etc.

Defendant pleaded the general issue.

The errors assigned are as follows :

1. The court below erred in giving improper instructions on behalf of appellee.
2. The court erred in refusing to give to the jury proper instructions asked by appellant.
3. The court erred in refusing to give to the jury the peremptory instructions asked by appellant at the conclusion of the whole evidence in the case, directing the jury to find appellant not guilty.
4. The court erred in overruling appellant's motion for a new trial.
5. The verdict is excessive.

6. The court erred in rendering judgment on the verdict against appellant.

A. & J. F. LEE and C. E. POPE, attorneys for appellant.

The mere relation of master and servant can never imply an obligation on the part of the master to take more care of a servant than he may reasonably be expected to take of himself. The Karr Supply Co. v. Kroenig, 167 Ill. 560; Priestly v. Fowler, 3 M. & W. 1; Penn. Co. v. Lynch, 90 Ill. 333.

Appellee, being acquainted with the risk of the place where he was required to work, and, with this knowledge, continuing to work without objection, assumed the risk, and can not complain if he was subsequently injured by exposure to such risks. East St. Louis Ice & Cold Storage Co. v. Crow, 155 Ill. 74; Stafford v. C., B. & Q. Ry., 114 Ill. 244; Missouri Furnace Co. v. Abend, 107 Ill. 44; C. & A. R. R. Co. v. Munroe, 85 Ill. 25.

FREELS & JOYCE, attorneys for appellee.

The rule that the servant assumes the ordinary risks incident to the business presupposes that the master has performed the duties of caution, care and vigilance which the law casts upon him. It is these risks alone, which can not be obviated by the adoption of reasonable measures of precaution by the master, that the servant assumes. The law is, that the servant does not assume risks that are unreasonable or extraordinary; nor risks that are extrinsic to the employment; nor risks of the master's own negligence. City of LaSalle v. Kostka, 190 Ill. 135.

The master's duty to the servant is always to be performed. He can not delegate that duty to an employe and thereby relieve himself from liability to another servant for an injury caused by its neglect. The neglect of that duty is not a peril which the servant assumes. C., B. & Q. R. Co. v. Avery, 109 Ill. 322; C. & A. R. Co. v. Maroney, 170 Ill. 525; C. & E. I. R. Co. v. Kneirim, 152 Ill. 461; Pullman Palace Car Co. v. Laack, 143 Ill. 243; City of LaSalle v. Kostka, 190 Ill. 135.

These duties of the master to use ordinary care to fur-

nish the servant a safe place to work and to keep it safe, and to give him notice of unusual danger which the master knows or ought to know, and the servant does not know, are primary and are not assignable. *Norton v. Volzke*, 158 Ill. 409; *C. & E. I. R. Co. v. Kneirim*, 152 Ill. 461; *Ill. Steel Co. v. Schymanowski*, 162 Ill. 461; *Hess v. Rosenthal*, 160 Ill. 628; *Pullman Palace Car Co. v. Laack*, 143 Ill. 243; *C. & A. R. Co. v. Maroney*, 170 Ill. 525.

MR. JUSTICE WORTHINGTON delivered the opinion of the court.

It is clear from the evidence that contributive negligence on the part of appellee is not a factor in the case. It is also clear that somebody was negligent or the jam of the car would not have occurred. With this preliminary statement the reasons urged for reversal of the judgment will be considered.

It is urged that the damages are excessive.

The jury assessed appellee's damages at \$2,500. Upon the suggestion of the court, a remittitur of \$500 was entered and judgment rendered for \$2,000. The evidence, if true, shows that before the injury, appellee was a strong, hearty man, capable of performing heavy labor, and was earning \$2.10 per day; that by the injury he was ruptured, and since then has been compelled to wear a truss, and is incapable of doing hard work; that at his age of fifty-three years the chances of a cure are limited, without an operation, which would be of doubtful utility, and not advisable unless the hernia became strangulated, in which case it would be necessary to save his life; that at times, in consequence of the injury, appellee is compelled to quit work for several days, and that when at work his bowels sometimes come down, causing suffering and annoyance. From this evidence we can not say that the damages are excessive.

It is not assigned as error that the court admitted improper testimony for appellee, or excluded proper testimony offered by appellant. The contention of counsel for appellant upon these points is therefore not before us for review.

It is urged that the collision of the cars was one of the

risks assumed by appellee in his employment. If it was caused by negligence, it was not a risk that was assumed. The servant assumes only the ordinary risks incident to his employment, and negligence of the master is not one of these risks.

"The rule that the servant assumes the ordinary risks incident to the business, presupposes that the master has performed the duties of caution, care and vigilance which the law casts upon him. It is these risks alone that can not be obviated by the adoption of reasonable measures of precaution, that the servant assumes." *Pantzar v. Tilly Foster Mining Co.*, 99 N. Y. 376; *Booth v. Boston & Albany R. R. Co.*, 73 N. Y. 40; *Noyes v. Smith & Lee*, 28 Vt. 64.

"The law is that the servant does not assume risks that are unreasonable, or extraordinary, nor risks that are extrinsic to the employment, *nor risks of the master's own negligence.*" *City of LaSalle v. Kostka*, 190 Ill. 135.

"The master's own duty to the servant is always to be performed. The neglect of that duty is not a peril which the servant assumes." *C., B. & Q. R. R. Co. v. Avery*, 109 Ill. 322; *C. & A. R. R. Co. v. Maroney*, 170 Ill. 525.

Whether the risks, in any particular case, are the ordinary risks which the servant assumes, is a question of fact to be determined by the jury from the evidence in the case, under the instructions of the court. If the collision of the cars which injured appellee had been so great as to have telescoped and crushed the car in which he was employed, it would be clear that such a risk was not an ordinary risk which appellee assumed. Whether a collision, so sudden and violent as to throw him forcibly against the handle of his shovel, and thereby cause a rupture, was a risk which appellee assumed, was for the jury to answer, and which they have answered in favor of appellee.

In view of the evidence in this case, we can not find differently without invading the province of the jury.

But one instruction was given for appellee, which is as follows:

"The court instructs the jury that it is the duty of the master to use reasonable care to furnish a reasonably safe place for the servant to work while in the performance of the service required of him; and if the jury believe from

the evidence that the defendant has failed to discharge its duty in this behalf, as charged in the declaration, and that the plaintiff while in the exercise of ordinary care in the discharge of his duty, and without notice of the danger, was injured by reason of the negligence of the defendant, as charged in the declaration, then the jury may find for the plaintiff, and assess his damages, if they believe from the evidence that he has sustained any damages, at such sum as they believe from the evidence to be reasonable compensation for the injury so sustained, not, however, to exceed the amount sued for."

Against this instruction appellant urges as error, that while the declaration avers that it was the duty of appellant "to furnish the plaintiff with a reasonably safe place to work," that it does not charge negligence in not doing so. This criticism is upon the sentence quoted and is hypercritical. It was the duty of appellant in the first instance, to furnish appellee a reasonably safe place to work; it was a continuing duty, which was not discharged if appellant, by subsequent negligence, made it unsafe. *C. & E. I. R. R. Co. v. Kneirim*, 152 Ill. 461.

If subsequent negligence of appellant, aptly charged in the declaration, caused the injury of appellee, thereby rendering the place where he worked unsafe, it was not necessary to specifically aver this result of the negligence.

The proximate cause of the injury was the collision of a car against the car in which appellee was working. The collision was the natural result of the impact of the locomotive against a car, communicated through other cars standing on the same track. When the declaration alleged this impact of the locomotive and its result upon the refrigerator car and upon appellee, it was not necessary to aver specifically that it rendered the refrigerator car unsafe and that thereby appellant was liable. If appellant is liable, his liability is sufficiently averred by charging the initial act of negligence, which was the proximate cause, operating through connected agencies, visible and plain of comprehension.

We fail to see how the statement criticised, is error,

when considered in connection with the evidence and the remainder of the instruction, or how it could in any way have misled the jury.

Seventeen instructions were given for appellant, covering every phase of the case. Some of them were more favorable to appellant than the law warrants. A slight modification of the seventeenth instruction, which is assigned for error, is not referred to in appellant's brief. The assignment may therefore be considered as waived. The modification, however, was not material and was not error.

An instruction was asked, directing the jury to find for defendant. It is the stereotyped *pro forma* instruction now asked in most cases of personal injury. It falls under the criticism stated in *Central Ry. Co. v. Knowles*, 191 Ill. 241.

There is evidence in this case, clearly tending to establish the cause of action. It was not, then, error to refuse the instruction.

The pivotal issue in the case, as we comprehend the evidence, is whether or not appellant is liable for the negligent act of the St. Louis National Stock Yards Company, which caused the collision of the cars. Appellant contends that the Stock Yards Company was an independent contractor for whose negligence it is not liable. Appellee contends that the relation of master and servant existed between appellant and the Stock Yards Company, and that the company was using appellant's tracks inside the inclosure, while working for appellant, and under the orders of appellant's yard master.

There is some conflict in the evidence as to whether the refrigerator car belonged to appellant, or to "Swift's Refrigerator Line" a different corporation. We do not regard this as material, since it is undisputed that appellant was using it at the time of the injury, for loading meat, and put appellee, its employe, to work in it.

If the St. Louis National Stock Yards Company was working as an independent contractor on the 3d of November, when appellee was injured by the collision caused by

its locomotive, then appellant is not liable for the negligence of the Stock Yards Company as a servant of appellant. *Hexamer v. Webb*, 101 N. Y. 377; *Shearman & Redfield on Neg.*, Sec. 162.

What was the relation of the National Stock Yards Company to appellant?

It appears from the evidence that the National Stock Yards Company worked only at appellant's plant, and under its directions. Chas. T. Jones, the manager of the National Stock Yards Company, testified:

"Q. Under whose control was the switching crew of the St. Louis National Stock Yards when working at and around the plant of Swift & Company on the 3d of November, 1900? A. Under Swift & Company's instructions.

Q. I will ask you what control the St. Louis National Stock Yards had over that crew when working in the yard of Swift & Company? A. We have no control over it; it is there subject to their orders."

Cross-examination:

"What part of their time was spent at Swift & Company's and what part elsewhere? A. It is all spent at Swift & Company's; in their business.

Q. Is that engine used nowhere else? A. No sir; on their own business.

Q. Don't they take cars out of other places? A. To and from their plant only.

Q. Do you mean to say that at that time there was an engine that did work at Swift's plant alone—did work nowhere else? A. Yes, sir.

Q. Do you mean to say that the Stock Yards Company had no control over this engine? A. Not while they were at Swift's.

Their instructions came from Swift's yardmaster to the foreman of the crew, to switch cars any place they want them.

* * * * *

Q. Do you mean to say that Swift & Company were at liberty to discharge or employ these men? A. They merely controlled the engine crew while there.

Q. They told them what they wanted in the way of what cars to put in and what cars to take out? A. Anything that was to be done at their plant.

* * * * *

Q. Don't you know that this crew did its work in its own way—that they were told at Swift & Company's what they were to take out and bring in? A. They were instructed how to switch cars.

Q. That was all? A. Yes, sir."

Wm. Beasley, foreman of the switching crew, testifies:

"Q. Please state, Mr. Beasley, whether or not Swift & Company, on the 3d of November, 1900, had a yardmaster there? A. Yes, sir; L. H. Hartwell was the yardmaster at that time.

Q. What did he do there as yardmaster? A. Well, he directed the work.

Q. Directed what work? A. Well, see that the cars were properly placed to unload, and for loading.

Q. Under whose control are you when working inside the yard of Swift & Company? A. Well, sir, under the control of Swift & Company's yardmaster. We never got in there without an order. As long as we were in Swift & Company's yard we were under the control of Swift & Company's yardmaster. * * * We went to Swift & Company's plant at seven o'clock in the morning, and when not pulling cars, stayed by the little office up in the yards, the car repairer's office; that is Fitzpatrick's office; he is foreman of the car department. We would wait there when we had nothing to do to be in readiness to go to work if anything should turn up. As long as we were in Swift & Company's yard we were under the control of Swift & Company's yardmaster; but when we got over to the National Stock Yards, our yardmaster over there, the general yardmaster, he might say, go and do something, and of course we would not refuse him. We were under the jurisdiction of Swift & Company's yardmaster, that is what I was told when I was put in charge of an engine. He did not direct me how to do the work as long as I got it done; they did not direct me how to do it."

Both these witnesses testify that the manner of working the engine in doing its work was left to the crew.

"We think this evidence shows that the National Stock Yards Company was not employed as a common carrier and that the law as to common carriers, cited by appellant, does not apply.

Webster defines a common carrier as "one who under-

takes for hire to transport goods from one place to another."

Anderson's Law Dictionary, p. 150, "one who undertakes for hire or reward, to transport the goods of such as choose to employ him, from place to place."

Wood on Railways, Vol. 3, p. 1876, "one who plies between certain termini, and openly professes to carry goods for all such persons as choose to employ him."

What, then, was the character of the Stock Yards Company? There is no evidence that it contracted to do any specific work for appellant. It was subject to its orders to move cars when and where required. When not engaged it waited for orders in appellant's inclosure.

Appellant cited from Roberts & Wallace on The Liability of Employers, p. 14, four characteristics of a master, as follows:

1. The engaging of a servant.
2. The payment of wages.
3. The power of dismissal.
4. The control of the servant's actions.

All these tests may be applied under the evidence, and the results will tend to prove that the Stock Yards Company was a servant of appellant. It is not material that this corporation selected and paid its own employes. The corporation itself was the servant of appellant. It worked for appellant. The presumption is that it was paid for its work. There is nothing to indicate that it could not have been discharged by appellant at its pleasure. It worked under the orders of appellant's yardmaster. If it was the servant of appellant, the negligence of its employes would be actionable against appellant to the same extent as if its employes had been directly employed by appellant.

We think the testimony of Jones and Beasley shows that the relation of the Stock Yards Company to appellant was that of an employe, or servant, for doing certain kinds of work when ordered, and not that of an independent contractor.

The facts in the cases of Coal Run Coal Co. v. Strawn, 15

Bradwell, 347, and Foster v. Wadsworth-Howland Co., 168 Ill. 514, cited by appellant to sustain his contention that the Stock Yards Company was an independent contractor, are different from the facts as presented by the evidence in this case, and the decisions do not, therefore, sustain the contention.

It would needlessly extend this opinion to examine and differentiate them at length.

The judgment of the Circuit Court is affirmed.

**R. Hunter Craig, James R. Begg and James Simpson
Craig, Copartners under the Firm Name and Style of
R. Hunter Craig & Company, v. Harrison-Switzer Mill-
ing Company.**

1. INSTRUCTIONS—*Duty of Broker in Selling Commodities.*—The court gave the following instruction asked for by plaintiff, modifying it by adding the words in italics: "The court instructs the jury that if you believe from the evidence that plaintiffs refused to accept the flour shipped to them by defendant, or any part thereof, and that defendant consented to such refusal and ordered plaintiffs to sell the same or any part thereof for its account, and that plaintiffs did so sell said flour after reasonable and diligent effort, *at the highest price for said flour at the time of said sales*, then you will find for the plaintiffs in an amount equal to the difference between the amount advanced by plaintiffs on account of the draft against rejected flour and the net amount you find was realized by plaintiffs from the sale of such flour for the account of the defendant." *Held*, that the court erred in modifying the instruction. The contract was that plaintiffs should sell the flour "for the highest obtainable price." This contract imposed no greater duty or burden than the law imposes in the ordinary case between a commission broker and his customer. The broker must exercise reasonable and diligent effort, and when he has done that, he has done all the law requires, and if plaintiffs did that in this case, they have done all that their contract requires. It means, the highest price obtainable by reasonable and diligent effort; that and no more.

Assumpsit.—Error to the Circuit Court of St. Clair County; the Hon. MARTIN W. SCHAEFER, Judge presiding. Heard in this court at the February term, 1902. Reversed and remanded. Opinion filed September 11, 1902.

Craig v. Harrison-Switzer Milling Co.

DANIEL G. TAYLOR, MARSHALL W. WEIR, E. S. ROBERT
and D. W. ROBERT, attorneys for plaintiffs in error.

WISE & McNULTY, attorneys for defendant in error.

MR. JUSTICE CREIGHTON delivered the opinion of the court.

This was an action of assumpsit in the Circuit Court of St. Clair County, by plaintiffs in error against defendant in error. The pleas were the general issue and set-off. Trial by jury. Verdict in favor of defendant in error. Judgment on the verdict against plaintiffs in error for costs.

The following is a statement of so much of the facts of this case as appears to us necessary for the purposes of this opinion. Plaintiffs in error are copartners, doing business in Glasgow, Scotland, engaged in handling and selling flour on their own account and on commission. Defendant in error is a corporation with its place of business at Belleville, St. Clair county, Illinois, engaged in manufacturing and selling flour. In August, 1897, defendant in error sold to plaintiffs in error, to be delivered at Glasgow, Scotland, a quantity of flour called "Patron," at 31s. and 9d. per 280 lbs., and a quantity of another kind of flour called "Red Star," at 29s. per 280 lbs. In pursuance of custom defendant in error drew a draft with bills of lading attached, on plaintiffs in error for the full price of the flour, which plaintiffs in error paid, but notified defendant in error that it had shipped just twice as much flour as plaintiffs in error had bought. When the flour arrived plaintiffs in error claimed that it was not up to the grade of the samples and so notified defendant in error. After considerable correspondence by cable and letters, it was finally agreed that plaintiffs in error should sell the remaining 750 sacks of flour on account of defendant in error "for the highest obtainable price." In pursuance of this agreement plaintiffs in error sold the flour, and the testimony tends to show that they exercised a high degree of diligence and made unusual efforts to obtain as high a price as possible for it. They sold it out in small lots and reported the sales from time to time as they were made. Defend-

ant in error received these reports in due course and entered neither objection nor protest. The result of these sales was that they produced a sum less than it would have produced at the rate of the original contract price, and less than the amount of the draft which plaintiffs in error had paid prior to the arrival of the flour. Plaintiffs in error rendered an itemized account and demanded that defendant in error reimburse them. This defendant in error refused to do and thereupon plaintiffs in error commenced their suit. There were some small items in dispute on the trial in the Circuit Court, as to which errors are assigned, not embraced in the foregoing statement, but we do not consider them of sufficient importance to require separate statement and discussion.

Plaintiffs in error contend that the court erred in admitting any evidence in support of the plea of set-off. This question need not be further discussed than to say that all the competent evidence admitted on behalf of defendant in error as to this branch of the case was competent by way of recoupment under the general issue. It is so well established in this state that in an action of *assumpsit* a defendant may, under the general issue, recoup unliquidated damages arising out of the contract, or out of the subject-matter of the suit, that no authority need be cited in support of the proposition. All that was effected here was recoupment. If the verdict returned by the jury and the judgment rendered by the court involved a set-off, then it would be our duty to discuss the questions raised by counsel, and they would be interesting questions, too.

It is also insisted that the court erred in admitting the testimony of certain witnesses as to the market value of the particular brands of flour in question, in the city of Glasgow, Scotland, upon the dates the flour in question was sold. No witness is competent to testify to the market value of a particular commodity at a particular time and place, until the fact has been established to the satisfaction of the court that such witness knows what the prevailing price for the commodity in question was, at the particular time and in

the particular place in question. None of the witnesses who testified on behalf of defendant in error as to market value, measure up to the requirements of the rule, except Mr. Imbs.

Counsel for plaintiffs in error asked the court to give to the jury an instruction, which the court refused to give as asked, but which the court modified and gave as modified. The words in italics are the words the court inserted by way of modification. As modified the instruction is as follows:

“3a. The court instructs the jury that if you believe from the evidence that plaintiffs refused to accept the flour shipped to them by defendant, or any part thereof, and that defendant consented to such refusal and ordered plaintiffs to sell the same or any part thereof for its account, and that plaintiffs did so sell said flour after reasonable and diligent effort, *at the highest market price for said flour at the times of said sales*, then you will find for the plaintiffs in an amount equal to the difference between the amount advanced by plaintiffs on account of the draft against rejected flour and the net amount you find was realized by plaintiffs from the sale of such flour for the account of the defendant.”

The court erred in modifying the instruction. The contract was that plaintiffs should sell the flour “for the highest obtainable price.” This contract imposed no greater duty or burden than the law imposes in the ordinary case between a commission broker and his customer. The broker must exercise reasonable and diligent effort, and when he has done that, he has done all the law requires, and if plaintiffs in error did that in this case, they have done all that their contract requires. It means, the highest price obtainable by reasonable and diligent effort; that and no more.

The judgment of the Circuit Court is reversed and the cause remanded.

George Phillip Eckert v. Henry Weilmuenster, Sr.

1. **ADVERSE POSSESSION**—*Must Be Exclusive and Notorious*.—In order to give a title by adverse possession it is sufficient if the land is appropriated to individual use in such manner as to apprise the community or neighborhood that the land is in the exclusive use and enjoyment of another.

Forcible Entry and Detainer.—Error to the County Court of St. Clair County; the Hon. WILLIAM HARTZELL, Judge presiding. Heard in this court at the February term, 1902. Affirmed. Opinion filed September 11, 1902.

WINKELMANN & BAER, attorneys for plaintiff in error.

WEBB & WEBB, attorneys for defendant in error.

MR. JUSTICE WORTHINGTON delivered the opinion of the court.

This is an action of forcible entry and detainer. It was tried before a justice of the peace, where a verdict was rendered against the defendant, who appealed to the County Court of St. Clair County, where verdict was entered against the plaintiff, from which he appeals to this court.

The complaint describes the parcel of land as follows :

“Beginning at a point twenty-seven feet due east of a point 105 feet due south of the northeast corner of lot number five (5) of the Mill Company’s First Addition to the Town of Darmstadt, in St. Clair county, in the State of Illinois, from the said beginning point run south thirty-six (36) feet; thence east twenty-three (23) feet; thence north thirty-six (36) feet; thence west twenty-three (23) feet to the beginning point, situated in the town of Darmstadt, in the county of St. Clair, in the State of Illinois.”

In 1864, the Mill Company, composed of Martin Eckert, Henry Eckert and others, laid out an addition to the town of Darmstadt. The addition was platted by the surveyor of St. Clair county into twenty-three lots, and it extended Jackson street, in the old town, through lot one. On the plat made by him are lots 5 and 9, and certain other lots,

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and between these lots 5 and 9, a strip fifty feet wide. These other lots, including lots 5 and 9 and the strip, are no part of the addition laid out by the St. Clair county surveyor, but he certifies that Stauder, surveyor of Washington county, has laid out eight lots, "as he finds from a report made by the surveyor of Washington county," and includes them in his plat which is recorded in the St. Clair county recorder's office. Lot 5 was at that time occupied by Martin Eckert, and lot 9 by Henry Eckert.

On said plat is the following acknowledgment:

"We, the undersigned, do hereby certify that the within plat as laid out of the Mill Company's Addition to the town of Darmstadt, is in accordance with our direction and wishes, as witness our hands and seals this 16th day of August, 1864."

This is signed and sealed by George Martin Eckert, Henry Eckert and others.

Jackson street runs north and south to Mills street which is the northern boundary of lots 5 and 9, and as appears on the plat, extends south from Mills street between lots 5 and 9, and includes the twenty-seven by thirty-six-foot parcel in question.

In 1879, Henry Eckert conveyed lot 9 and all his interest to Martin Eckert. Martin Eckert conveyed lot 9 to Schultz, and in January, 1897, Schultz conveyed lot 9 to the defendant, Weilmuenster.

In August, 1894, Martin sold lot 5 to plaintiff in error, together with all his interest there, including a five-acre pasture lot at the south end of the strip.

In 1894, there was a hedge fence on the west line of lot 9; a plank fence on the east line of lot 5, and 105 feet south from the northeast corner of lot 5, there was a plank fence (with a gate opening in the middle). This fence ran across the strip from lot 5 to lot 9. On the south end of the fifty-foot strip is a paling fence (with a gate opening into plaintiff's pasture).

In 1898, defendant removed the hedge fence from the west line of lot 9, and thereupon plaintiff put up a wire

fence within eighteen inches from defendant's west line, so as to keep inclosed what is called the cow lot, in which plaintiff kept his cows.

It will be noted from this statement that while that part of the plat of the Mill Company's addition made by the surveyor of Washington county does not convey the fee of the extension of Jackson street between lots 5 and 9 to the town of Darmstadt, for the reason that it is not certified by the surveyor of St. Clair county, in which the town of Darmstadt is situated, yet the plat as certified by the surveyor of St. Clair county, refers to it and embraces it, and that it is of record, and that it is in "accordance with the wishes and direction of George Martin Eckert and Henry Eckert, through whom appellant derives title to lot 5.

It is shown by evidence and by a small plat attached, that there is a fence 105 feet south of the north boundary of lots 5 and 9, with a gate in it, thus leaving open to the public that part of Jackson street between the fence and Mill street, as platted by the surveyor of Washington county.

It is in evidence that appellant has for several years penned his cows in the lower or south part of the strip. It is also in evidence that appellee has used this strip as a passage way or street repeatedly, as he saw fit, since 1897, when he bought lot 9.

Appellee testifies: "Have known the street dividing my place from Mr. Eckert since it was laid out. The space that divides our lots is Jackson street. * * * I still use it for my own purposes, hauling water through there sometimes, hauling manure on my place, also hauling straw or potatoes."

He is corroborated by other witnesses.

Christian Teillman testified: "Have lived in Darmstadt forty years; that is Jackson street; since it was surveyed and laid out it was Jackson street, of course, and the people of Darmstadt and the people generally around there used that street when occasion required."

Peter Steinheimer: "Have known that street about eighteen years. It is known by Jackson street. I know of my own knowledge that the people used it when they need it."

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Michael Juenger: "Am acquainted with Mr. Eckert and Mr. Weilmuenster. Am acquainted with the street that separates their premises. Have known it eleven years. It is Jackson street. The people of Darmstadt use it for a street."

Conrad Heberer: "Have lived in Darmstadt twenty-six years. As far as I know they call it Jackson street. I lived on Jackson street, and that's the same. The people of Darmstadt, Mr. Weilmuenster included, use it as a street."

Henry Eckert, brother of the plaintiff, testifies: "I lived in the same house where Mr. Weilmuenster lives from 1864 to 1879. Yes, sir. Guess it is Jackson street. It is known as Jackson street by the people of Darmstadt."

John Weilmuenster: "They call it Jackson street. Everybody in town knows it. Have seen other people down on that street. Everybody used that street who had occasion to use it."

Henry Knecht, for defendant, testifies: "I have known that street long enough. It has been a street. I went through there with a wagon."

Adam Weilmuenster, for defendant, testifies: "Have lived in Darmstadt sixty-two years. Have known that street since they laid it out. I went through there and never thought anything about it."

The intent to dedicate this fifty-foot strip as a street is clearly shown by the acknowledgment in the plat of the St. Clair county surveyor. While it was not a statutory dedication, that part of the plat not being certified to by the surveyor of St. Clair county, it was referred to in his certificate, and embraced in the plat made by him, as having been made by the surveyor of Washington county, and was recorded in St. Clair county.

The evidence above cited tends strongly to prove an acceptance by the public, and a recognition of the strip as Jackson street from the time of the filing of the plat to the present time. The fact that a part of this strip may have been occupied since 1894 by appellee as a cow pen, or that there was a fence with a gate in it through which the public passed at will, could not defeat the right of the public to its use as a street, if it was dedicated and accepted as such.

But we think, under the evidence, it is not necessary in

affirming the judgment to hold that the strip is a public street. With no claim whatever of ownership, and basing a right to recover solely upon occupancy, we think the evidence fails to show such exclusive use and enjoyment as are necessary to sustain an action of forcible entry and detainer.

Such possession must be exclusive and notorious. The general rule as to such possession is thus stated in *Brooks v. Bruyn*, 18 Ill. 542:

“As a general rule, it is sufficient, if the land is appropriated to individual use in such manner as to apprise the community or neighborhood of its locality, that the land is in the exclusive use and enjoyment of another.”

To the same effect are *Lancey v. Brook*, 110 Ill. 612; *Keith v. Keith*, 104 Ill. 402; *St. L., A. & T. H. R. R. Co. v. Nugent*, 152 Ill. 124.

The instructions, when construed as a series, fairly presented the law of the case to the jury.

Instructions 9 and 12, given for appellee, when so considered, did not tend to mislead the jury. Judgment affirmed.

Henry Gunkel et al. v. Henry Bachs.

1. *PRACTICE—Proof of Title in Fee Simple.*—Where one avers that he is the owner of land in fee simple, he must prove the averment by such evidence, at least, as would have entitled him to recover in an action of ejectment.

2. *SAME—Proof in Actions for Penalties.*—In actions for penalties more than a preponderance of the evidence is required to sustain a verdict for damages.

Debt, for recovery of penalties. Appeal from the Circuit Court of Madison County: the Hon. WILLIAM HARTZELL, Judge presiding. Heard in this court at the February term, 1902. Reversed and remanded. Opinion filed September 11, 1902.

WILLIAM P. BRADSHAW and TERRY & WILLIAMSON, attorneys for appellants.

SPRINGER & BUCKLEY, attorneys for appellee.

MR. PRESIDING JUSTICE BIGELOW delivered the opinion of the court.

Appellee originally brought an action of trespass, but by leave of court afterward changed his declaration to an action of debt against appellants for the recovery of penalties for cutting certain trees, without permission of appellee so to do, which were standing and growing upon the southwest quarter of the north west quarter of section number five, in township number five north, in range number seven west of the third principal meridian, in the county of Madison in this State, which land appellee claimed to be the owner of in fee simple. The action was brought under section 5 of chapter 136 of the Revised Statutes. A trial by jury resulted in a verdict that appellants were guilty of cutting eight trees (naming the several kinds and penalties), the total penalties amounting to \$39.

A motion by appellants for a new trial having been overruled, they interposed a motion in arrest of judgment, which was also overruled, and exception was taken to each ruling.

Ten errors are assigned on the record, but it will be necessary to notice only the ruling of the court in overruling appellants' motion for a new trial, for the alleged reason that the verdict was contrary to both the law and the evidence.

Appellee averred in his declaration, that he was the owner of the land in fee simple, on which the trees were growing, at the time they were cut; it therefore became necessary that he should prove the averment by such evidence at least, as would have entitled him to recover had the action been ejectment instead of debt. *Wright v. Bennett*, 3 Scammon, 258. We are not to be understood, however, that such a *quantum* of evidence would have been sufficient, as the action is for a penalty, and it is a well established rule of law that in such a case more than a preponderance of the evidence is required to sustain a verdict for damages. *Town of Lewiston v. Proctor*, 27 Ill. 414; *T. P. & W. Ry.*

Co. v. Foster, 43 Ill. 480; Ruth v. City of Abingdon, 80 Ill. 418.

For anything that appears in the record, the title to the land where the trees were cut is still in the government, as no patent for it, or certificate of entry of it, was put in evidence.

Appellee testified that he owned the land; Henry Gunkel testified that he owned and had been in exclusive possession of it for more than fifteen years past.

Appellee put in evidence a warranty deed of the land to him, executed by one John Weaver, on the 22d of March, 1893.

There is no legal evidence in the record that Weaver ever had any title to the land, or that he was ever in possession of it. If he was not in possession of the land, exercising dominion over it, he had nothing to sell, and his deed conveyed nothing, unless he had title deducible from the government or under some one of the various statutes of limitation, and there is no evidence in the record that he had either.

For the error in overruling the motion of plaintiffs in error to set aside the verdict and grant a new trial on the ground that the verdict was against the law and the evidence, the judgment is reversed and the cause remanded.

William Winklemann v. Illinois Central R. R. Co.

1. *VARIANCE—When it Amounts to a Substantial Defense.*—A variance not objected to in the trial court, can not be taken advantage of in the Appellate Court; but this is true only where the variance is of such a character that it does not defeat the action entirely. Where it is a substantial defense, the law as to variance does not apply.

Action on the Case.—Damages caused by the overflow of water upon land. Error to the Circuit Court of St. Clair County; the Hon. WILLIAM HARTZELL, Judge presiding. Heard in this court at the February term, 1902. Affirmed. Opinion filed September 11, 1902.

AUGUST H. BAER, attorney for plaintiff in error.

KRAMER, CREEGHTON & SHAEFFER, attorneys for defendant in error; JOHN G. DRENNAN, of counsel.

This is an action brought by plaintiff in error to recover damages for an overflow of water upon his land, caused, as he alleges, by the improper and wrongful construction of the trestlework of a railroad, which at the time was operated by defendant in error.

The St. Louis, Alton & Terre Haute Railroad Company is the owner of a railroad running from the city of East St. Louis, in the county of St. Clair, in a southeasterly direction through the city of Belleville.

In the year 1881 said company built a branch road, known as the Belleville & Carondelet Railroad, extending from the city of Belleville, in a westerly direction, to the Mississippi river.

The said St. Louis, Alton & Terre Haute Railroad Company operated said railroads until the 1st day of October, 1896, when it leased them to defendant in error, and the defendant in error has operated them ever since.

Plaintiff in error is the owner of a tract of land in the southerly portion of the city of Belleville, known as the Fair Grounds.

The said railroad that runs from the city of East St. Louis in a southeasterly direction passes along the northeasterly corner of said land. The Belleville & Carondelet Railroad runs a short distance south of said land. Richland creek runs in a southeasterly direction near the westerly side of said land, and is crossed by the Belleville & Carondelet Railroad about 400 feet south of said land. Across said stream, on said railroad, is constructed a trestlework about sixty feet in width, with piling bents about fifteen feet apart.

In 1885 there was a heavy rainstorm, and a large quantity of water overflowed plaintiff in error's land, for which he instituted suit against the St. Louis, Alton & Terre Haute Railroad Company, the owner and then operator of the said Belleville & Carondelet Railroad, charging it with obstructing the water by its embankments and trestlework across

Richland creek, and causing it to overflow his lands, in which suit he recovered a judgment for \$500 against said railroad company.

The declaration in the present suit alleges that the St. Louis, Alton & Terre Haute Railroad Company is the owner of the railroad known as the Belleville & Carondelet Railroad; that the same was leased to defendant in error on or about the 1st day of October, A. D. 1896, and that defendant in error has since operated the same; that the said railroad is constructed with an embankment and bridge across Richland creek with a trestlework; that the trestle is improperly constructed, and of insufficient capacity to permit the natural flow of water, in ordinary freshets, which passes through the channel of said stream; that on or about the 29th day of May, 1898, an ordinary rainstorm set in, and a large quantity of rainwater naturally fell, which water would have flowed off without damaging the plaintiff had the bridge over Richland creek been of sufficient capacity, but that said bridge was of insufficient capacity to let the water flow, and it backed up and ran on plaintiff's land and damaged him.

The declaration also alleges that defendant in error, in January, 1898, was notified of the unsuitable and improper construction of said trestle bridge, and requested to so change it as to allow the free flow of water, but that defendant in error neglected and refused to so change it.

The recovery of a judgment against the St. Louis, Alton & Terre Haute Railroad Company in 1892 is not averred in the declaration.

The general issue was pleaded and verdict and judgment were for defendant, from which plaintiff brings the case before this court upon writ of error.

MR. JUSTICE WORTHINGTON delivered the opinion of the court.

It is urged as error, that the court refused to admit in evidence the declaration, plea and judgment of the Circuit Court in January, 1892, in a suit by plaintiff in error against

the St. Louis, Alton & Terre Haute Railroad Company for overflowing the land in question, by reason of the trestle-work and bridge complained of in the present case.

It is claimed that this judgment is conclusive as to the liability of defendant in error, as a lessee of the St. Louis, Alton & Terre Haute Railroad Company, upon the allegation of the improper construction of the bridge trestle, and the consequent effect in overflowing plaintiff in error's land.

If the record of the former judgment was competent at all under the declaration, upon which point we do not pass, it was competent as evidence in chief. It was discretionary with the court to admit this evidence in favor of plaintiff after defendant had rested his case, but it was not error to refuse to admit it as evidence in rebuttal. He can not complain because he was not allowed to split his evidence by offering a part of it in chief to prove his case, and a part in rebuttal.

It is urged that the court erred in submitting the following special interrogatory to the jury:

"Was the rain storm which fell on May 9, 1898, an ordinary or an extraordinary rain storm?"

One objection urged is that this interrogatory was not presented to plaintiff at the close of the evidence, but was presented after the opening argument to the jury had been made by counsel for plaintiff, and defendant's counsel was addressing the jury. We assume that the practice of the Circuit Court of St. Clair County permitted counsel for plaintiff to reply to counsel for defendant's argument. If so, the purpose of the statute requiring special interrogatories to be presented to opposing counsel before argument, was secured, as counsel for plaintiff had an opportunity to discuss the evidence upon this special interrogatory. It may be added also, that the record shows no objection made to submitting the interrogatory on account of the time when it was presented to counsel.

It is also urged that the special interrogatory should not have been submitted because it does not submit "an ultimate question of fact."

The declaration alleges "that said bridge was improperly constructed and altogether insufficient of capacity to permit the natural flow of water that, in ordinary freshets, pass in and out through the channel when the bridge is so constructed, to flow; that in freshets, said bridge obstructs the natural flow of water," etc.

Plaintiff avers that he gave notice to defendant of the improper construction of the bridge and requested defendant to change it so as "to permit the free flow of water as aforesaid."

Plaintiff further avers that on the 29th day of May, 1898, "an ordinary rain storm set in," and avers an overflow and damage from this storm.

Plaintiff in error asked and the court gave the following instructions:

"If from the evidence in this case the jury believe that the Illinois Central Railroad Company, defendant in this suit, had been duly notified at the time set forth in the declaration, that the embankment and trestlework in question in this suit were insufficient to permit the natural flow of water in ordinary floods and freshets to pass, as set forth in the declaration; that from the time of the notice, and from thence to the commencement of this suit, defendant, the Illinois Central Railroad Company, permitted the embankment and trestlework to remain insufficient, as aforesaid, and did not provide sufficient opening in said embankment and trestlework to permit the passage of the water which would naturally flow in said water-course during ordinary periodical floods and freshets, and that on, to wit, May 29, 1898, there was a flood and freshet in the neighborhood and on the lands adjoining plaintiff's fair grounds; that by reason of said obstruction an increased quantity of water was forced upon plaintiff's land (fair grounds,) from which the plaintiff suffered injury, as alleged in the declaration; then plaintiff is entitled to recover, etc.

If from the evidence in this case the jury believe that the plaintiff, by a preponderance of the evidence, has proven all the allegations contained in the declaration, then the plaintiff is entitled to recover, and the jury may assess plaintiff's damages at such amount as from the evidence the jury believe plaintiff ought to recover."

The third instruction refers to the allegations of the declaration specifically and concludes:

“And if the jury further believe from the evidence that in the month of May, 1898, the fair grounds were overflowed, and the overflow was caused by the obstruction of the embankment and trestlework being insufficient to permit water in ordinary floods and freshets to pass in and through the channel of said creek and through said trestlework, then your verdict ought to be in favor of plaintiff, and you may assess the damage at such amount as from the evidence you believe the plaintiff ought to recover.”

It is clear from these citations that the case was tried by plaintiff in error upon the proposition that the rain storm of May, 1898, was not an extraordinary rain storm, or such as defendant in error could reasonably anticipate.

It is in evidence that it was an “extraordinary heavy rain storm;” “quite a flood;” “an unusually heavy storm.”

The instructions for defendant in error are based upon this proposition. That being so, the special interrogatory calls for an answer upon a controlling issue, and it was not error to submit it. In this view we think there was no error in giving instructions numbered 2 and 4 asked by defendant. Instruction 6, given for defendant, is open to the criticism that it does not state what the material allegations of the declaration are, while it tells the jury that they must believe from the evidence that the plaintiff has proved by a preponderance of the evidence every material allegation in the declaration.

But plaintiff in error, in his instructions, recited the material allegations necessary to be proved, and so taking the instructions as a series, the jury were told what were material allegations.

It is also urged that because the proof showed a greater rain storm than the declaration alleged, that this does not, on the ground of variance, preclude a recovery. It is true that a variance not objected to in the trial court, can not be taken advantage of in an appellate court.

But this is true only where the variance is of such a character that it does not defeat the action entirely.

If defendant in error was legally bound to use reasonable care in the construction of its trestle bridge to prevent an

overflow in ordinary freshets, or such as might reasonably be anticipated, but was not bound to anticipate and guard against extraordinary floods, then proof of an extraordinary flood was proof that negated plaintiff's right to recover.

It was more than a mere variance; it was a substantive defense; and the law as to variance as stated by plaintiff in error does not apply.

Finding no reversible error in the record, the judgment is affirmed.

Louis Kalina et al. v. Henry Steinmeyer et al.

1. *COSTS—Rule in Chancery Does Not Apply in Statutory Actions.*—The rule in regard to costs governing in chancery cases does not apply in proceedings under the statute to enforce a mechanic's lien. The matter of costs in those cases is controlled by statute.

2. *SOLICITOR'S FEES—In Mechanic's Lien Proceedings.*—The statute makes the assessment and taxing of an attorney's fees against the losing party in a mechanic's lien proceeding mandatory upon the court, and makes no provision as to the manner of determining the amount, nor as to the amount, except that it shall not exceed ten per cent. While it is the usual practice of the court to hear evidence in such cases, yet to make such assessment and tax such fee without first hearing evidence is at most only an irregularity.

3. *PRACTICE—Errors Working No Injustice to Party Appealing.*—Where a court has power to act, a judgment or decree will not be reversed for an error which can work no injustice to the party who appeals.

Mechanic's Lien Proceedings.—Appeal from the Circuit Court of Madison County; the Hon. WILLIAM HARTZELL, Judge presiding. Heard in this court at the February term, 1902. Affirmed. Opinion filed September 11, 1902.

BURTON & WHEELER, attorneys for appellants; W. E. HADLEY, of counsel.

C. N. TRAVOUS and GEORGE D. BURROUGHS, attorneys for appellees; W. G. BURROUGHS, of counsel.

Kalina v. Steinmeyer.

MR. JUSTICE CREIGHTON delivered the opinion of the court.

This was a proceeding in the Circuit Court of Madison County, by appellees against appellants, to establish and foreclose a sub-contractor's lien. Trial before the chancellor upon evidence produced and taken in open court. Decree in favor of appellees for \$766.50, with costs, including \$75 for solicitor's fees.

Appellants owned the real estate in controversy, and entered into a contract with one Gahl, a contractor and builder, for the erection of a frame residence thereon, the contractor to furnish all labor and materials and complete the building for \$1,570. As the work progressed appellees furnished to the contractor lumber and other material for the building. Subsequently a dispute arose between the parties as to the amount and value of the materials furnished by appellees, and appellants tendered to appellees the sum of \$638.17 as the full amount due them. Appellees demanded a larger sum, declined to accept the tender, and instituted proceedings to establish and foreclose a lien as sub-contractors. Appellants kept their tender good, and renewed it upon the trial in the Circuit Court.

Counsel for appellants contend that the contract between appellants and the builder does not specify the time within which the building should be completed, nor the time when payment should be made, and that therefore, under the present mechanics' lien law of this state there can be no lien, and cite *Freeman v. Rinaker*, 185 Ill. 172, and *Kelly v. Northern Trust Co.*, 190 Ill. 401. Upon this proposition counsel are foreclosed by a recent decision of the Supreme Court (*Keeley Brewing Co. v. Decorating Co.*, 194 Ill. 580), in which the court holds that the rule laid down in the cases relied on by counsel does not apply to sub-contractors, and says: "A sub-contractor's lien is given by section 22 of the act." "The lien of the sub-contractor being a direct lien, its existence does not depend upon the existence or non-existence of a contractor's lien." "The cases, therefore, relied upon, have no application to the liens of the sub-contractors sought to be enforced in this case."

At the trial of the case in the Circuit Court, testimony of experts was offered to prove that the amount of material charged for by appellees had not been used in the construction of appellants' building, and counsel insist that this fact is established by the evidence, and that therefore the amount decreed by the trial court is too large. As to this position counsel are also concluded by the decision of the Supreme Court above cited and quoted from. Upon this question the court in that case say:

"The claim that some of the materials furnished was for the improvement of other premises, and that some of it was used in making screens, boxes, etc., which were not attached to the real estate, and that there was no sufficient proof of the value thereof, is without force. The proof shows that the materials furnished were all delivered at the place where the improvement was being constructed, for the purpose of being used in such improvement. Section 7 of said act provides that the lien for material shall not be defeated because of lack of proof that the material, after the delivery thereof, actually entered into the construction of the building or improvement, provided it is shown that such material was in fact in good faith delivered at the place where said building or improvement was being constructed, for the purpose of being used in such construction."

The evidence in the case at bar sufficiently establishes the fact that all the material, for which the trial court entered its decree, was in fact in good faith delivered at the place where the building was being constructed, for the purpose of being used in such construction.

Another objection urged against the decree is that the notice served by appellees upon appellants is not sufficiently specific, and that false items were intentionally and fraudulently included in the sum demanded. The notice to be served by a sub-contractor is provided for in section 25 of the act, and the one served in this case meets all the requirements of that section. The fact that by mistake the sum demanded is too large, or that for any reason the sub-contractor is unable to establish by sufficient evidence the full amount of his demand, will not bar him of his right to a lien for the amount justly due him. Section 7 of the act, cited by counsel, has no application to this case.

Kalina v. Steinmeyer.

During the trial a controversy arose as to the value of two doors, for which appellees had charged \$2.45 each. Appellants' counsel sought to show that these two doors were worth somewhat less than appellee had charged, and offered to prove their market value, when the court interposed and "closed the incident," with the remark, "Well, you need not go into their value." In this the court erred, but we think, under all the facts of the case, this error is sufficiently diminutive to fall under the rule, *Lex non curat de minimis*, which, Senator Palmer used to say, "being interpreted, means the court will not stop, during a trial, to run after chickens."

A solicitors' fee of \$75 was assessed by the court, taxed as part of the costs, and decreed to be paid by appellants. No evidence was heard as to the value of the solicitors' services in the case. Counsel insist that it was error for the court to fix the amount of the solicitors' fee without having "evidence to show what was a reasonable fee for the services rendered." The statute provides:

"Sec. 18. The costs of proceedings as between all the parties to the suit, shall be taxed equitably against the losing parties. * * * In all cases where liens are enforced, a fee of five dollars shall be taxed for filing the claim for lien, and the court shall order a reasonable attorney's fee, not exceeding ten per cent, taxed as a part of the costs, in favor of the claimant, and where the same are defeated in favor of the owner."

After the decree had been rendered and the attorneys' fee assessed, appellants moved the court to re-tax the costs, including the solicitors' fee of \$75, and to apportion the same between appellants and appellees. In this motion no objection is made as to the amount of the fee assessed, but only that because appellees had recovered less than their demand and because of the tender of so large part of the demand by appellants, a portion of the costs, including the fee, should be taxed to appellees, and it is not claimed here that the fee is excessive. The claim now is that the court had no authority or power to assess any fee without first hearing evidence.

The Circuit Court did not err in refusing to apportion the costs between appellants and appellees, for the statute provides that the costs shall be taxed against the losing parties, "but equitably as between themselves." "The rule in regard to costs governing in chancery cases does not apply in cases of proceedings under the statute to enforce a mechanic's lien. The matter of costs in those cases is controlled by statute." *Kipp v. Massin*, 15 Ill. App. 300.

The statute makes the assessment and taxing of an attorney's fee against the losing party in a mechanic's lien proceeding mandatory upon the court, and makes no provision as to the manner of determining the amount, nor as to the amount, except that it shall not exceed ten per cent. Appellants' counsel have not cited us to any authority in support of their position that the court has no authority or power to assess and tax such fee without first hearing evidence. While we know it to be the usual practice of the court to hear evidence in such cases, and think it the better practice, yet we are of opinion that to make such assessment and tax such fee without first hearing evidence, is at most only an irregularity. In *Goodwillie v. Millmann*, 56 Ill. 524, the court holds that the chancellor, having the requisite skill and knowledge as to what is a fair and reasonable fee, should exercise his own judgment and not be wholly governed by the evidence as to the value of the services rendered. The fee assessed and taxed in the case at bar is within the statutory limit, and it is apparent to us from what the record discloses that the amount is not in excess of what would be a reasonable fee for the services rendered. Where a court has power to act, a judgment or decree will not be reversed for an error which can work no injustice to the party who appeals.

We find no substantial error in this record. The decree of the Circuit Court is affirmed.

Sartison v. B. & O. S. W. R. R. Co.

**Franz Sartison, Adm'r, v. The Baltimore & Ohio S. W.
R. R. Co.**

1. *CONSOLIDATION—Reorganization—One Railroad Bought by Another—Parties.*—Where one railroad procures, by purchase, the property and franchises of other roads, and then by deed transfers all its property to another company, the last company is not a reorganization of the old company, and there is no consolidation which will warrant the substitution of the new company as party defendant in a suit originally brought against the old company.

Action on the Case.—Error to the Circuit Court of St. Clair County; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding. Heard in this court at the February term, 1902. Affirmed. Opinion filed September 11, 1902.

Statement.—This is an action on the case brought by plaintiff in error against defendant in error, to recover damages on account of the death of John Schneider, deceased, which plaintiff in error claims was caused by the negligence of Judson Harmon and Joseph Robinson, their agents and servants, while they, the said Harmon and Robinson, were receivers of the Baltimore & Ohio Southwestern Railway Company, duly appointed by the Circuit Court of the United States for the Southern District of Illinois.

The case was tried on a second amended declaration, which, as abstracted, is as follows:

“Franz Sartison, administrator of the estate of John Schneider, deceased, plaintiff in this suit, complains of the Baltimore & Ohio Southwestern Railroad Company (a corporation), defendant in this suit, of a plea of trespass on the case.

For that, whereas, the Baltimore & Ohio Southwestern Railway Company, a corporation, on, to wit, the first day of January, 1890, and from thence up to and until the first day of August, 1899, was the owner of a certain railroad extending through the country aforesaid, its railroad track leading from the city of East St. Louis eastwardly to and through the town of O'Fallon, to and through the city of Lebanon, to Trenton, in Clinton county, State aforesaid, and further.

That during all of the time said railroad track was owned as aforesaid, said last mentioned corporation owned a certain side railroad track at Lebanon aforesaid, located, to wit, fifteen feet away from said first mentioned railroad track, running parallel with said first mentioned railroad track, and extending, to wit, one mile in length.

That before, and on the first day of January, 1890, and from thence hitherto, said railroad track, and said side railroad track in said city of Lebanon, crossed a certain public highway, its location being north and south, used for the travel of pedestrians, vehicles, teams and the like, which said highway has been in existence for the last past twenty years, and that the traffic on said highway is very frequent, extensive and great.

Plaintiff further avers that while said last mentioned corporation was such owner, and in possession of said railroad track and railroad side track, on, to wit, the first day of January, 1898, by the United States Circuit Court for the Southern District of Illinois, Judson Harmon and Joseph Robinson were duly appointed receivers of said last mentioned corporation, and from thence until, to wit, August 1, 1899, said Harmon and Robinson, as such receivers, operated said railroad, daily running locomotive engines and cars on the same from said East St. Louis to O'Fallon, Lebanon, Trenton, and further, and return; also leaving railroad freight cars, as many as, to wit, fifty at a time, placed standing on said side railroad track.

Plaintiff further avers that said receivers by their agents and servants operated said railroad as aforesaid, from, to wit, the last day of January, 1893, until, to wit, the 1st day of August, 1899, during all of which time said receivers received all the earnings and income from the use of said railroad, amounting to a large sum of money, to wit, twenty million (\$20,000,000) dollars, made lasting and valuable improvements on said railroad premises, as well as purchased large tracts of land for the use, and used by said receivers, and turned over to said last named corporation, being of great value, to wit, one hundred thousand (\$100,000) dollars.

Plaintiff further avers that while said Harmon and Robinson were in possession, by their agents and servants operating said railroad, on, to wit, the 6th day of May, 1899, and during all of that day, on said side railroad track, said receivers, by their agents and servants, left standing, to wit, fifty freight box cars coupled together, so that the

first car west was standing within, to wit, fifteen feet from the east side of said public highway where said railroad track and side railroad track cross said public highway at Lebanon as aforesaid.

Plaintiff further avers that said receivers, by their said agents and servants, on the 6th day of May, 1899, by leaving said freight cars on said side railroad track crossing, obstructed the view of persons traveling upon said highway within a mile from where said tracks cross the same, and by the obstruction aforesaid made said crossing a dangerous one to persons driving teams and vehicles upon and over the same.

Plaintiff further avers that while said freight cars were so left on said side track, it became and was the duty of said receivers, by their agents and servants operating and in charge of the locomotive engines and train of cars attached thereto, on the approach to said crossing to move locomotive and train slowly and with care, and at a distance of eighty rods from said crossing commence ringing the bell or blowing the whistle, and continue to ring the bell or blow the whistle until said crossing was reached.

Plaintiff further avers that on said 6th day of May, 1899, said receivers, by their agents and servants, were operating said railroad, moving and running a locomotive engine and train of cars attached thereto at a great speed, to wit, at the rate of sixty miles per hour, without blowing a whistle or sounding a bell at any time within eighty rods just east of said crossing.

Plaintiff further avers that on the 6th day of May, 1899, John Schneider was lawfully and rightfully traveling, to wit, riding in a cart drawn by a mule upon and along said public highway at the crossing aforesaid, and while on said crossing, the locomotive engine drawing a train of cars attached thereto coming from the east, in charge of the agents and servants aforesaid, running on the main track at the rate of speed aforesaid on said crossing, with great force and violence struck said cart and mule, thereby throwing said Schneider out of said cart and upon the ground, whereby and in consequence of said throw and fall said Schneider was then and there killed.

Plaintiff further avers that when about one mile distant from said crossing, and all the time thereafter continuously while driving toward the said railroad crossing, and while said Schneider drove to and upon said crossing, he used due care and caution in watching said railroad track and its

crossing aforesaid, and listened for the purpose of ascertaining whether a locomotive engine and cars attached thereto operated on said main railroad track was coming from the east toward said crossing, but no locomotive and cars attached thereto was seen by said Schneider, nor was any bell rang or whistle blown as required as aforesaid.

Plaintiff further avers that on, to wit, August 1, 1899, said Harmon and Robinson as such receivers, by said United States Court were discharged from their duties as such receivers.

That thereupon, to wit, on the day and year last aforesaid, last mentioned corporation was reorganized and incorporated by the name and style of The Baltimore & Ohio Southwestern Railroad Company and then and there said railroad property, together with all its side tracks, appurtenances, real estate and personal property, including the improvements as aforesaid, were sold, transferred and turned over to the defendant herein; said sale and transfer as aforesaid were made August 1, 1899, subject to the claims and demand that existed and had been incurred by said receivers in operating and controlling said railroad, of which the defendant had notice, and purchased accordingly, and ever since said defendant has been and still is the owner in possession and is operating said railroad, and is moving and running locomotive engines and cars attached thereto on said track, taking and receiving the earnings of said road for its own use."

To the declaration defendant filed a plea of not guilty, on which issue was taken, and the case was tried by a jury, which, at the close of plaintiff's evidence the court, on motion of the defendant, instructed to return a verdict for the defendant, and this being done, the plaintiff excepted to the ruling of the court in giving the instruction, and filed his motion for a new trial, for the following reasons:

"First. The court improperly gave to the jury the first instruction asked by the defendant.

Second. The verdict is contrary to the law and evidence in the case.

Third. Newly discovered evidence to the effect that the defendant, Baltimore & Ohio Southwestern Railroad Company, is a reorganization of the Baltimore & Ohio Southwestern Railway Company."

After the jury had returned their verdict, and on the

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hearing of the motion for a new trial, plaintiff's counsel produced and read to the court a document as follows:

“In the Circuit Court of the United States,
for the Southern District of Illinois,
Thursday, February 21st, A. D. 1901.

Present—Hon. William H. Seaman, District Judge.

FARMERS' LOAN AND TRUST COM-
PANY and W. H. H. MILLER,

vs.

BALTIMORE & OHIO SOUTHWESTERN
RAILWAY COMPANY and the MER-
CANTILE TRUST COMPANY.

} In Chancery.
Consolidated Cause.

Upon motion of the Baltimore & Ohio Southwestern Railroad Company, the assignee of the purchasers in the above entitled cause, and it appearing to the court that Judson Harmon and Joseph Robinson, receivers heretofore appointed, have in compliance with the former orders of the court made in this cause, turned over and delivered to the said Baltimore & Ohio Southwestern Railroad Company all property of every sort, nature and description, which came to their hands by virtue of their appointment as receivers as aforesaid, and that the said Baltimore & Ohio Southwestern Railroad Company has assumed all the contracts and liabilities of said receivers, and that no reason exists for continuing said receivership, it is therefore ordered by and with the consent of said Judson Harmon and Joseph Robinson as receivers, that the said Judson Harmon and Joseph Robinson be and hereby are discharged as receivers, provided that all suits and proceedings heretofore begun against the said receivers, and in which service has been made upon said receivers, and which may have begun by intervening petition in this cause, shall be continued in the name of said receivers, and the said The Baltimore & Ohio Southwestern Railroad Company is hereby authorized to appear in and defend said causes, if it shall deem proper, and to use the names of said receivers in the defense thereof.

CIRCUIT COURT OF THE UNITED STATES, } ss.
Southern District of Illinois.

I, James T. Jones, clerk of the Circuit Court of the United States, in and for the Southern District of Illinois, do hereby certify that the foregoing is a true copy of an order of court entered February 21, 1901, discharging the receivers, in a certain cause wherein the Farmers' Loan and Trust

Company and W. H. H. Miller are complainants and the Baltimore & Ohio Southwestern Railway Company and the Mercantile Trust Company are defendants, as truly as the same appears of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at Springfield, in said district, this 14th day of June, in the year of our Lord one thousand nine hundred and one.

[SEAL.]

JAMES T. JONES, Clerk."

R. H. HORNER and WINKELMANN & BAER, attorneys for plaintiff in error.

KRAMER, CREIGHTON & SHAEFFER, attorneys for defendant in error; EDWARD BARTON, of counsel.

MR. PRESIDING JUSTICE BIGELOW delivered the opinion of the court.

Of the four errors assigned we deem it necessary to consider but one—the giving of the instruction to the jury to find a verdict for the defendant.

It is said by counsel for plaintiff in error, in their statement of the case, that this suit was originally brought by plaintiff in error against Harmon and Robinson, the receivers of the Baltimore & Ohio Southwestern Railway Company, as well as against that company, before the receivers were discharged, and that the plaintiff afterward dismissed his case against the receivers and the railway company, and plaintiff, on his own motion, substituted the present defendant in place of the original defendants.

A contention of counsel for defendant in error is, that the deceased, at the time he was killed, was not exercising ordinary care for his own safety. Whether he was or not we deem it unnecessary to determine.

The only evidence offered in the case was introduced by the plaintiff; the defendant offered none. The evidence shows that the Baltimore & Ohio Southwestern Railway Company was made up of several different lines of road in this State, which several lines had been mortgaged separately. These mortgages having fallen due and remaining

unpaid, proceedings were begun by the several holders of the mortgage indebtedness, in the Circuit Court of the United States for the Southern District of Illinois, to foreclose the mortgages, and such proceedings were had in the cases, which were consolidated together, that on or about the 27th of May, 1899, a decree of foreclosure of the several mortgages was made and entered by the court, and the court appointed a special master commissioner to sell the railroad, its property and franchises at public vendue, in case default was made in the payment of the several sums of money found due by the court, within the short day fixed by the court; and the amounts found due and remaining unpaid, the special master commissioner, after having duly advertised the entire property and franchises for sale, on the 10th of July, 1899, sold it to Edward R. Bacon, George Hoadly, and J. Chauncey Hoffman, for the sum of \$3,510,000, and a certificate of purchase of the entire property and franchises of the Baltimore & Ohio Southwestern Railway Company situated in this State, was executed by the special master commissioner to Bacon, Hoadly and Hoffman, as provided by the decree of the court. The decree contained among others, two clauses, as follows:

“The said master commissioner shall offer the property for sale, subject to the payment by the purchaser in each case of the portion of any indebtedness incurred by the receivers herein, and their fees properly chargeable against the property purchased, and such other claims as the court has heretofore or may hereafter order or decree to be prior or superior to the lien of the said mortgages or either of them on said property or any part thereof.”

“That within thirty days from the confirmation of said sale or sales, or such further time as the court may allow on application of the purchaser for good cause shown, the purchaser or purchasers of said property shall complete payment of the entire amount bid to the said master commissioner; and that on such payment, the said purchaser or purchasers, or his or their assigns, shall be entitled to receive a deed or deeds of conveyance thereof from the said master commissioner, and from the other parties to this cause as herein provided, and to receive possession of the property so purchased from the parties holding possession

of the same, subject, however, to the payment of the portion of any indebtedness incurred by the receivers, and their fees properly chargeable to the property so purchased, and of such other claims as the court heretofore or may hereafter order or decree prior or superior to the lien of said mortgages or either of them on said property or any part thereof, and the court reserves jurisdiction over said property, notwithstanding such deed or deeds or delivery of possession, for the purpose of enforcing such payment."

The sale was confirmed by the court on July 21, 1899.

On the 28th of July, 1899, Bacon, Hoadly and Hoffman assigned their certificate of purchase, issued to them by the special master commissioner, to the St. Louis, Springfield and Vincennes Railway Company, a corporation organized under the laws of this state, and on the same date the special master commissioner executed a deed of the railroad with all of the property, rights, franchises and privileges which were of the Baltimore & Ohio Southwestern Railway Company to the St. Louis, Springfield & Vincennes Railway Company.

Under and by virtue of a law of this state entitled, "An act concerning the rights, powers and duties of certain corporations therein mentioned, authorizing the sale and transfer of any railroad or railroad and toll-bridge, and other property, franchises, immunities, rights, powers and privileges connected therewith or in respect thereto, of any corporation in this state to a corporation of another state, and prescribing the rights, powers, duties and obligations of the purchasing company," (Laws of Illinois, 1899, p. 116,) the St. Louis, Springfield & Vincennes Railway Company, on the 29th of July, 1899, sold and by deed conveyed, all the property, franchises, rights and privileges that it had acquired by the deed of the special master commissioner, to the Cincinnati, Louisville & Vincennes Railway Company, a corporation duly organized under the laws of the State of Indiana. Immediately thereafter, upon the 1st day of August, 1899, the Cincinnati, Portsmouth & Parkersburg Railway Company, a corporation created and existing under the laws of the State of Ohio, and the Cincinnati, Louisville

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& Vincennes Railway Company, were duly consolidated, thus forming The Baltimore & Ohio Southwestern Railroad Company (defendant in error), and on the same date, in accordance with a decree of the court, the Baltimore & Ohio Southwestern Railway Company, deeded, by deed of quitclaim, to the Baltimore & Ohio Southwestern Railroad Company, all interest in and to the said railroad property, and the receivers surrendered and delivered the railroad, and all of its property, rights and franchises, to defendant in error.

In the face of the evidence furnished by plaintiff in error, we are unable to see how it can be claimed by his counsel that what was done was but a reorganization of the original railway company, under the name of The Baltimore & Ohio Southwestern Railroad Company, nor are we able to understand how the property, rights and franchises of the Baltimore & Ohio Southwestern Railway Company became, in a legal sense, amalgamated with the property, rights and franchises of any other railroad company. By the sale of the property, rights and franchises of the Baltimore & Ohio Southwestern Railway Company, it is true, they became the property of the purchasers, and passed to their assignees, but the purchase of a railroad, with its property and franchises, by one or more persons, is one thing, and the consolidation of the property of a railroad company and its franchises, with the property and franchises of another railroad company is another and altogether different thing.

There is a total failure of evidence tending to show that the Baltimore & Ohio Southwestern Railway Company was ever consolidated, in a legal sense, with any other railroad or railway company or companies, whatever.

Besides the contention of appellant's counsel that the suit is properly brought against the Baltimore & Ohio Southwestern Railroad Company, because this latter company, the defendant in error here, is but a reorganization of the Baltimore & Ohio Southwestern Railway Company, counsel for plaintiff in error further contend that the decree of foreclosure of the mortgages, and the sale of the property thereunder, gave plaintiff in error the right to substitute the defendant in error as a party defendant to this suit

at law, in the place of the receivers of the railway company. The Circuit Court of the United States in its decree did not undertake to clothe any creditor of the railway company with the power or right to bring suit against any purchaser or purchasers of the property and franchises of the railway company. What the court did was a direction to the master commissioner to "offer the property for sale, subject to the payment by the purchaser in each case of the portion of any indebtedness incurred by the receivers herein, and their fees properly chargeable against the property purchased, and such other claims as the court has heretofore, or may hereafter order or decree, to be prior or superior to the lien of the said mortgages, or either of them, on said property, or any part thereof."

The clear intention and meaning of the court in rendering this decree was not to open a door for litigation, over the doings of the receivers, through any court aside from itself.

Whether, when plaintiff in error dismissed the receivers out of the case and voluntarily substituted the present defendant in their stead, he did a wise thing, is not a matter before this court for consideration.

There is no allegation in the declaration that defendant in error ever promised or agreed to assume any liabilities of the Baltimore & Ohio Southwestern Railway Company, or of its receivers, although counsel for appellant incorrectly assume that it did so, and, to sustain their position, refer to the final order of the United States Court, entered February 1, A. D. 1891, discharging the receivers, when they knew that this decretal order was not offered in evidence on the trial of the case, and is no part of the evidence heard by the jury in the case, and for this court to consider it, as insisted upon by counsel, would be to consider a matter entirely foreign to the case.

There was no evidence before the jury on which a verdict for the plaintiff could have been sustained, and the court did not err in directing the jury to find a verdict for the defendant.

The judgment of the Circuit Court is affirmed.

The Singer Mfg. Co. v. Mary Ellington.

1. **SALES**—*Subterfuge to Call Sale a Lease*.—It is a mere subterfuge to call a transaction a lease, for the purpose of giving the vendor a lien on the thing sold until payment in full of the purchase money, and the application of that term in the written agreement between the parties, does not change its real character.

2. **SAME**—*Distinguished from Bailment*.—When the identical thing is to be restored in the same or an altered form, the contract is one of bailment, and the title to the property is not changed; but when there is no obligation to return the specific article and the receiver is at liberty to return another thing of equal value, or the money value, he becomes a debtor to return, and the title to the property is changed; it is a sale.

Assumpsit.—Appeal from the City Court of East St. Louis; the Hon. SILAS COOK, Judge presiding. Heard in this court at the February term, 1902. Affirmed. Opinion filed September 11, 1902.

ALEXANDER FLANNIGEN, attorney for appellant.

F. C. SMITH, attorney for appellee.

MR. JUSTICE WORTHINGTON delivered the opinion of the court.

Suit commenced before a justice, where judgment for \$45 was rendered in favor of plaintiff, from which judgment the defendant appealed to the Circuit Court of St. Clair County. By agreement, the venue was changed to the City Court of East St. Louis, where judgment for \$45 was again rendered for plaintiff, from which judgment defendant appeals.

The suit is to recover \$45 paid in installments by appellee to appellant for a sewing machine, which appellee received under a written agreement, in substance as follows:

"This certifies that I, Mary Ellington, have rented and received from the Singer Manufacturing Company, one Singer sewing machine, style V. S. 5 Dr. Oak, and No. 13,748,259, with apparatus belonging thereto, all in good order and valued at \$60 dollars, which I am to use with care, and keep in good order, and for the use of which I

agree to pay rent as follows: \$20, consisting in \$5 cash, \$15 old White on the delivery of this agreement, the receipt whereof is hereby acknowledged, and accepted as payment for the rent of the first month only, and then at the rate of \$3. per month thereafter, for sixteen months, at its agency in East St. Louis, without notice or demand.

But if default shall be made in either of said payments, or if I shall sell or offer to sell, remove or attempt to remove, the said machine from my aforesaid residence without the written consent of the said Singer Manufacturing Company, then and in that case, or at the expiration of the time for which the machine is rented, I will return and deliver the same to the Singer Manufacturing Company in good order, save reasonable wear, and the said company or its agents may resume actual possession thereof; and I hereby authorize and empower the said Singer Manufacturing Company, or its agents, to enter the premises wherever said machine may be, and take and carry the same away, hereby waiving any action for trespass or damage therefor and disclaiming any right of resistance thereto; and also waive all right of homestead and other exemptions, under the laws of said state, as against this obligation.

Witness my hand and seal this fifth day of December, 1896.

MARY ELLINGTON. [SEAL.]”

Appellee gave in evidence, without objection, the conversation with Craig, the agent of appellant, which led up to and induced the making of this contract. Her testimony was not contradicted, nor was that part stricken out which referred to what was said before the contract was signed. When this conversation was about being detailed by Dan Ellington, who was called after appellee testified, objection was made by defendant's counsel to his stating what was said, and the objection was sustained.

Counsel for defendant then moved as follows:

“I want to make this further motion; that the court exclude from the jury all the testimony of Mrs. Ellington and this boy, tending to change or vary, later on, the terms of the lease, or written contract, on the ground that all subsequent parol agreements are inadmissible for the purpose of contradicting a contract under seal. This lease is under seal, and I make that objection.

“The Court: The objection will be sustained so far as

it will apply to anything that will undertake to change the conditions of the contract, but it will be overruled so far as any evidence is concerned showing a waiver of it by the company."

It will be observed that the motion was only to exclude testimony "tending to change *later on* the terms of the lease or written contract on the ground that all *subsequent parol* agreements are inadmissible for the purpose of contradicting a contract under seal," and to this extent the motion was sustained.

This leaves for our consideration, all the testimony of appellee as to what was said or done before the execution of the contract.

Appellee testifies in substance :

"Craig came and asked me if we wanted a machine. Said he was one of the managers of the company; that Mrs. Kent sent him to me to buy a machine; I told him that I was not ready; I had just buried my son and could not afford it; he said for me to buy it and there would be no trouble; I could put in my old machine and they would give me ample time; this was about the fifth of December. He sold me a machine, \$5 down, \$15 for my old machine, and I was to pay \$3 a month, if I had it, and if I did not have it, he would take less. I told him not to take my old machine until I was ready to pay the \$5; he said there would be no bother about it. He took the old machine that day and brought the new machine into my house. I told him I did not have the money to pay down on it; he said, when would I have it? I said I did not know how soon; he said he would wait until February, would that do? I told him yes, I would have the money in February. He brought me a paper for me to sign. I supposed it was a bill of sale. I signed it and he took it with him."

In cross-examination, appellee testified :

"When I signed the paper it was this way; it was folded; and he laid it down for me to sign my name. It never was opened out at all; when I wrote my name at the bottom he folded it again; he turned it over one time like that, and laid it down; it was folded when he brought it; he laid it down for me to sign my name. I signed it and he turned it over and told me to sign again. He did not open it up. He told me it was a bill of sale."

This testimony is important as throwing light upon the true construction of the written contract in evidence. To the same effect is the testimony of Mrs. Kent, as follows:

"I was the one that had the agent bring the machine to Mrs. Ellington. I wrote the company if I could sell a machine would they give me five dollars. I told them if they agreed, to send their agent out to Mrs. Ellington. At that time she was willing to take the machine. They sent an agent out about two days after."

This evidence tends to prove a sale and not a lease. It shows that appellee thought she was buying a machine, not leasing one, and that the agent of appellee so represented.

If the uncontradicted testimony of appellee is true, the agent of appellant perpetrated a fraud in securing her signature to a folded paper which is a lease in form, giving her in terms no right or title to the machine when all the payments were made, and telling her that it was a bill of sale. But outside of this testimony, we think that an examination of the written instrument itself, warrants the construction that it represents a conditional sale and not a lease. It is not reasonable that \$20 should be paid in advance as the rent of a sewing machine for the first month, and that \$3 rent monthly should be paid thereafter until \$60 in all was paid, with no provision as to whose machine it should then be, or what should be done with it, when the statement of the agent before the contract was signed, was to the effect that the selling price of the machine was \$60.

In the case of *Murch v. Wright*, 46 Ill. 487, there is a contract for the leasing of a piano at \$50 a month, similar to the one in evidence, except that there is in it a provision that the lessee might purchase if he so desired, when he had paid installments amounting to \$700. Mr. Justice Lawrence in the opinion says:

"We entertain no doubt that the transaction was, in fact, a sale of the piano, though made to assume the form of a lease for the purpose of giving the vendor a lien on the instrument until payment in full of the purchase money. The mere statement of the facts show this. * * * It was a mere subterfuge to call this transaction a lease, and

the application of that term in the written agreement between the parties does not change its real character."

To the same effect are *Lucas v. Campbell*, 88 Ill. 447; *The Howe Machine Co. v. Willie*, 85 Ill. 333; *Latham v. Sumner*, 89 Ill. 233. In *Gilbert v. Gere*, 67 Ill. App. 592, in commenting upon an agreement purporting to be a lease, the court say :

"Reading between the lines, as the Supreme Court did in *Murch v. Wright*, 46 Ill. 487, and *Lucas v. Campbell*, 88 Ill. 447, it is apparent that the intention of the appellee and the Bermel Company was that the latter should acquire the property of the former upon terms of payment which they had agreed upon.

"When the identical thing is to be restored in the same or an altered form, the contract is one of bailment, and the title to the property is not changed; but when there is no obligation to return the specific article and the receiver is at liberty to return another thing of equal value, or the money value, he becomes a debtor to return, and the title of the property is changed; it is a sale. *Bastress v. Chickering*, 18 Ill. App. 207, *Ibid.*, 130 Ill. 206; *Loneragan v. Stewart*, 55 Ill. 49; *Richardson v. Olmstead*, 74 Ill. 213.

Under repeated decisions in our state, such a transaction would be an absolute sale, as to attaching creditors, but a conditional sale as between the parties. If our construction of the written contract is correct, appellant could reclaim the machine if appellee made default, but if she made all the payments the machine would become her property absolutely. By the terms of the contract she was obligated to pay sixty dollars. Appellant could waive his right to retake the machine, and rely upon a collection of the money.

The next question then is, appellant having elected to retake the property, what claim, if any, has appellee to the money she has already paid? There is no provision in the contract with reference to this, and there is no clause forfeiting payments made, in case of default. We are cited to no case which definitely answers this question. *Latham v. Sumner*, *supra*, was a case where a piano was sold for \$480, and \$80 paid on it, and four notes for \$100 each, given for

the remainder. It is said in the opinion, "there seems to have been an effort to give this sale the form of a lease of the instrument, but the whole contract considered, it must be regarded as a sale." The first note not being paid, a demand was made for the piano, and then an agreement arrived at by which the piano was surrendered and the notes returned. Suit was afterward brought to recover what had been paid on the piano. In deciding this case it is said:

"It is urged that appellee could not rescind the contract without placing appellant in *statu quo*, and failing to do so, is liable for all payments made to him on the contract. Appellant failing to make payment according to the condition of the notes, should have returned the instrument, and appellant only exercised his undoubted right in resuming possession. He violated no contract or legal right of appellant when he took the piano, and not only so, but it was with the consent of appellant; nor was there any agreement to refund payments already made. We are therefore at a loss to see that appellee declared a rescission, because he acted under the agreement itself, as well as by mutual consent of the parties. Had appellant refused to cancel the agreement and to restore the property, and appellee had taken it, then a question might have arisen as to a rescission and its consequences."

The opinion then goes on to state that appellee could recoup, in case of suit for payments made for use of instrument, etc., and states:

"If it were conceded, then, that appellant has a legal claim to demand the payment made on the contract, appellee has an equal right to claim for the use of the instrument or its depreciation by being used by appellant. These items, from the evidence, exceed the payments, and hence must defeat a recovery."

This case, then, does not decide that a suit to recover payments can in no instance be maintained, but rather tends to the opposite view. In the case at bar there was a rescission of the contract by appellant to which appellee objected, and offered to pay the balance due.

Fairbanks v. Malloy, 16 Ill. App. 278, decides only that under a conditional sale and default made, recovery of

payments made, can not be had in a replevin suit brought by vendor to retake the property for condition broken. It is said in this case :

“We think the plaintiff below was entitled to recover the possession of the property, according to the terms of the contract, without first tendering the money paid. In such cases it may be, that by reason of a breach of warranty, or other causes, the purchaser would have a just demand for the return of all or part of the purchase money, but the action of replevin is not an appropriate proceeding in which to determine a question of that sort, and the judgment for plaintiff thereon does not preclude the purchaser from a suit for that purpose.”

This case recognizes the right to recover payments made for “breach of warranty or other causes.”

We think that causes are shown by the evidence in the case at bar that gave a right of recovery of payments made, less whatever, if anything, is shown for depreciation in the value of the property or for its use. In the first place, appellee was induced to sign what is in form of a lease, upon the representation by an agent of appellant, that it was a bill of sale, the paper being folded and not read to her, or by her, and its character falsely represented to her.

In the second place, the cash payment of \$5 was not required when the sale was consummated, but was deferred for two months, in accordance with the promise made and inducement held out by the agent at the time of making the sale. It is also in evidence, that subsequent payments were made after they were due, until \$45 had been received by appellant, thus leading appellee to believe that appellant waived prompt payments and would not enforce its lien by taking the machine from her upon a subsequent default. Payments had been made as follows: April 4, 1897, \$3; June 30, 1897, \$3; October 6, 1897, \$3; February 1, 1898, \$3; May 5, 1898, \$3; July 14, 1898, \$3; October 11, 1898, \$3; November 19, 1898, \$3; February 4, 1899, \$3.

On the 13th of July, 1899, appellant replevied the machine. Appellee made no defense and appellant took

the machine and kept it. When the writ of replevin was served, appellee was sick, having given birth to a child a few days before. An agent of appellant came with the constable. It is in evidence, and is uncontradicted, that appellee said to the officer, "I only owe \$15, and I will go out and get the money for you;" and that he replied, "Oh, to hell with your money; I don't care if you don't owe me a dollar; it is the machine I want."

It is in evidence, when appellee "begged" the officer to leave the machine, as she testifies, that he beckoned to the agent who was with the wagon, to come in, and that he came in, and that he heard most of the conversation. From this evidence the jury may well have believed that appellee would have paid the \$15 if the agent of appellant had been willing to receive it. If this is so, it was a rescission of the contract by appellant when appellee was willing and offered to complete it.

In *Bastian v. Clifford*, 68 Ill. 67, five conditions are stated in which a vendee may recover payments made when a contract is rescinded. One of these is, "When the vendor has been guilty of fraud in making the contract." It also states the condition under which the vendee can not recover payments made as follows: "But when the vendor is in no default and is ready and willing to perform the contract on his part, the vendee can not recover back money paid by him on the contract."

As we read the evidence in the case at bar, appellant was guilty of fraud in securing a contract, in form a lease, when representing it to be a bill of sale. Appellant also waived defaults in payment when due, receiving them when made long after due, until three-fourths of the price agreed upon was paid, and then refused to receive the balance of \$15, when appellee offered to pay it, and insisted upon taking the property.

If it is said that the officer was not authorized to receive the money, it may be replied, that the evidence shows that he beckoned to the agent of appellant, who came in, and who heard "the most of the conversation."

If it is said that the money was not actually tendered, it may be replied that to the statement by appellee that she would go and borrow the money and pay it, the reply of the officer was that "he didn't want the money, he wanted the machine."

Contracts of the kind in evidence, are intended to secure the vendor for the purchase money. They should not be construed so as to give the vendor both the property and money received for it, unless so expressly stipulated, or, unless the facts in the case disclose no wrongful act in the vendor, and no grounds for relief in the vendee.

It would be a monstrous doctrine to hold in these days, when sales on the installment plan are so frequent, that a vendor, after having imposed a lease upon a vendee, by falsely representing it to be a bill of sale, and after acquiescing in numerous defaults in payments when due, and accepting them afterward, can collect all but a trifling balance, and then when the vendee proffers payment of the balance, refuse it, and retake the property and keep it and the money also.

We do not understand that the decision of any court goes to this extent, and it will require a very clear decision of a superior court to induce us to so hold.

Judgment affirmed.

**The Warder, Bushnell & Glessner Co. v. A. C.
Stiritz & Co.**

1. **VERDICT—When Not To Be Set Aside.**—Where the evidence is conflicting, the verdict will not be set aside if there is ample evidence to sustain it.

Assumpsit, on a written contract. Appeal from the Circuit Court of Williamson County; the Hon. JOSEPH P. ROBERTS, Judge presiding. Heard in this court at the February term, 1902. Affirmed. Opinion filed September 11, 1902.

W. O. POTTER and W. H. WARDER, attorneys for appellant.

VOL. 103.] *Warder, Bushnell & Glessner Co. v. A. C. Stiritz & Co.*

JOHN L. GALLIMORE and DUNCAN & DENNISON, attorneys for appellees.

MR. JUSTICE BIGELOW delivered the opinion of the court.

This suit was begun by appellant against appellees, before a justice of the peace of Williamson county, to recover the sum of \$100 claimed to be due and owing by appellees to appellant upon a written contract, by which appellant was to furnish to appellees, harvesting machines, to be sold and accounted for by appellees, at certain net prices named in the contract.

The case was appealed to the Circuit Court of the county, where a trial was had before a jury, and a verdict was rendered in favor of appellant, against appellees, for the sum of \$1.90. After overruling a motion by appellant for a new trial, the court rendered judgment on the verdict and plaintiff below has brought the case here by a further appeal and assigns as error, the refusal by the court to admit competent evidence for the plaintiff, and in admitting improper evidence on behalf of the defendants; also in refusing to give proper instructions to the jury for the plaintiff; in giving improper instructions for the defendants, and in overruling plaintiff's motion for a new trial.

Appellant furnished to appellees a sample machine, which, by the terms of the contract, appellees were to return or account for, in good notes or cash. The machine was sold to one Shadowen, who gave his notes therefor, and the pivotal question in the case is, by whom it was sold; whether by appellees or by one Kelly, an agent of appellant, acting under special instructions of one H. C. Hentz, general agent of appellant. Appellant refused to take the notes in payment for, or in lieu of the machine, claiming that appellees are responsible for the sale, while appellees claim that they had nothing to do with the sale of the machine; that they received no commission for the sale of it; that Kelly sold the machine to Shadowen, for the net price it was billed to appellees by appellant. It is not contended by appellant that appellees purchased the machine,

but it is conceded they were only to act as appellant's agents, in selling it, the commission for making a sale to be the difference between the price at which it was billed to appellees, and the sum they should receive on making a sale of it.

We have read all of the evidence with care, and while it is true that some incompetent evidence was permitted to go to the jury on behalf of appellees, yet appellant interposed no objection to it, thereby tacitly admitting its competency; hence no further notice need be taken of it.

Hentz testified that he had full power over the property of appellant in his territory, which embraced more than a dozen counties, and there is ample evidence that he directed, or at least permitted and ratified, the sale of the machine by Kelly to Shadowen, against the protest of appellees.

It must be admitted that there is considerable evidence tending to show that appellees made the sale, but it is not of such a conclusive character as warrants this court in saying the verdict of the jury is wrong.

The machine was the property of appellant, appellees having a mere power to sell it, which appellant could terminate at any time; and if appellant did terminate the power, as the evidence tends to show it did, then the written agreement between the parties had nothing to do with the machine thereafter, because its provisions did not apply to the changed condition of the parties.

Appellant's instructions as modified, and one which was refused, merely made it incumbent on appellant to show by a preponderance of the evidence that appellees sold the machine under the power given them by their agency contract, and in this we are unable to say the court erred, so long as appellant had given simultaneous power of sale to another agent over the same property.

Appellees never became indebted to appellant on account of this machine, so long as appellees kept it safely for appellant and were ready to turn it over according to appellant's direction. Appellees could only become indebted under their contract of agency, for and on account

of the machine, if they sold it to a person, or to persons, and took notes which appellant did not approve within six months from the date settlement was made, in which case appellees were required to pay cash or other approved notes in place of the rejected notes. But before that point could be reached appellant must show that appellees sold the machine and we see nothing wrong in requiring it to establish this fact by a preponderance of the evidence.

The fact that the notes of Shadowen given for the machine had been included in the settlement as notes taken by appellees, is cogent evidence against them, but it is not conclusive. It was for the jury to determine from a preponderance of the evidence, whether the machine was sold to Shadowen under the contract of agency between appellant and appellees or not, and they have found it was not, and we are unable to say their finding is not sustained by the evidence.

Appellees admitted on the trial that they were indebted to appellant \$1.90 for taxes paid by appellant on the machine, which appellees, by the terms of their contract, should have paid.

We find no substantial error in the record, and the judgment is affirmed.

William Kolowski et al. v. George Fausz et al.

1. *WILLS—Requirements as to Signing.*—With respect to the signing of wills our statute simply follows the statute of frauds, and imposes the same requirements—that the will shall be in writing and shall be signed.

2. *SAME—Where the Requirements Are the Same as the Statute of Frauds.*—Where the statute requires no more than is required by the statute of frauds, it is immaterial where in the will the signature of the testator is placed, if it be placed there with the intention of authenticating the instrument.

3. *SAME—Where Witnesses Sign.*—In the absence of statutory provision to the contrary, it is immaterial upon what part of the instrument the attesting witnesses sign their names.

4. *SAME—Bill in Chancery to Test Validity.*—In a bill in chancery

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to contest the validity of the will, it is always proper to show the state and condition of the instrument and all that transpired at the time of its execution as of the *res gestæ*, and this may be shown by any competent witness, whether he be a subscribing witness or not.

Bill in Chancery. in the nature of a bill to contest the validity of a will. Error to the Circuit Court of Randolph County; the Hon. MARTIN W. SCHAEFER, Judge presiding. Heard in this court at the February term, 1902. Affirmed. Opinion filed September 11, 1902.

WINKELMANN & BAER, attorneys for plaintiffs in error.

H. CLAY HORNER, attorney for defendants in error.

MR. JUSTICE CREIGHTON delivered the opinion of the court.

This was a bill in chancery in the nature of a bill to contest the validity of a will, filed in the Circuit Court of Randolph County, by plaintiffs in error against defendants in error. The trial was before the court without a jury and resulted in a decree in favor of defendants in error, sustaining the will.

The bill is in the usual form of a bill to contest the validity of a will, on the ground that the will had not been executed in conformity with the requirements of the statute as to signing and attesting. Counsel and the court all appear to have interpreted the bill and the issues raised thereon as not involving the whole instrument, but only certain clauses, denominated, "Ninth" and "Tenth." The entire instrument is set out in the bill *in haec verba*, and the original is certified to us for inspection. The instrument is written on one long sheet of paper resembling the legal-cap paper in common use. This sheet had been prepared by some stationer as a blank for use in the writing of wills. It had printed on it at one place, near the top of a page as it was doubled, a blank form for the introductory part of a will, and at another place a blank form for the attesting clause of a will, and at another place a blank form for the backing and file marks to be placed upon the instrument, as the designer of the form intended it should ultimately be folded. Between the form for the introductory part and that for the attesting clause was a blank space of sixty-six ruled

lines; between the form for the attesting clause and the form for the backing and file marks, was a blank space of twenty-seven ruled lines, and between the form for the backing and file marks and that for the introductory part of the will was an unruled blank space of about one-half inch, the space between these being the point at which the sheet was doubled.

The blanks are properly filled up for the will of the deceased, Nicholas Fausz, and of the space between the form for the introductory part and that for the attesting clause, fifty-six lines, all but ten lines is covered with writing to express various gifts, bequests, devises, desires and directions of the testator, and of the space between the attesting clause and that for the backing and file marks, twenty lines are covered with writing to the same purpose. In this latter space are written clauses "Ninth" and "Tenth," the clauses under contest. Prior to the filing of the bill herein by plaintiffs in error, the entire instrument, including the clauses under contest here, had been duly admitted to probate in the County Court, as the last will and testament of Nicholas Fausz, deceased.

Upon the final hearing of this case in the Circuit Court defendants in error, the proponents, identified the instrument and the affidavits of the subscribing witnesses made in the County Court at the hearing when the will was admitted to probate, and introduced the same in evidence. The affidavits of the subscribing witnesses are in due form and fully meet all the requirements of the statutes as to substance. Proponents also introduced the following testimony :

"J. R. Duclos, who, being duly sworn, testified as follows: Age is sixty-nine years; reside in Prairie du Rocher; occupation is that of justice of the peace. This paper marked 'Exhibit A' was written by me. It is the last will and testament of Nicholas Fausz. Was present when he signed, and also Otto Hogemiller and Louis Steible, who were witnesses to the will. In writing this will I had a former will of Mr. Fausz, written by Ex-County Judge George L. Reiss to follow. It was written on a regular

form, similar to the will. In the former will he gave George the hill farm, and Nicholas the bottom farm. I simply re-wrote the clauses, interchanging the names of the sons. These were material changes, otherwise I was instructed to copy the will as Judge Reiss had written it. In the old will, the ninth and tenth clauses followed the attestation clause just the same as in this will. I was particular to make line correspond with line, so to come out just as he did. The signature of the testator and witnesses in the old will were just the same as in this one. All the ten clauses of the will were written before the testator and the witnesses signed it. As I wrote each clause I read it to the testator before writing the next clause. I wrote the will, commencing with the caption, line for line with Judge Reiss' will, down to the clause appointing the executor; I then turned over beyond the attestation clause and finished the ninth and tenth clauses line for line with Judge Reiss' will. I then read the entire will to the testator so far as I had written it. I then asked him for the names of the executors, and he said he wished his son-in-law, William Hoffman, and his son George Fausz, to be appointed executors. I then filled out the clause beginning with the word 'lastly,' and the printed blank for the witnesses' attestation, as it appears on the will, all before signature of testator and witnesses. Also clause beginning: 'In witness whereof.' The two witnesses and myself were present when it was signed. Witnesses were on each side of the testator when he signed, and testator was standing close to witnesses when they signed. Testator said to witnesses: 'Gentlemen, this is my will, and I wish for you to witness my signature.' Testator said to witnesses: 'Sign the will.' He stood over each one as they signed it. During the writing of the will, witnesses were in an adjoining room, where they had been waiting for about two hours. After will was written, testator called the witnesses into the room. During the execution of the will we were all in the room together. After the will was written, before the witnesses were called in, he said the old will would be of no more use to him, and burned it in the stove. This will marked 'Exhibit A' is the will that I wrote as above stated, and the signature of Nicholas Fausz was signed by him in my presence. He lived over a year after the execution of the will."

"Otto Hogemiller, being duly sworn, on oath, testified as follows: My age is fifty-two years; residence in Prairie du Rocher precinct; occupation farmer. I saw this paper

marked 'Exhibit A' before. It is the last will of Nicholas Fausz. I signed as witness; Nicholas Fausz asked me to. He held his hand on my shoulder and saw me sign it. I noticed some portion of the will was below my signature when I signed it. I took the will to look over it, and J. R. Duclos told me not to read it; that all he wanted of me was that I should sign it as a witness. Mr. Duclos and Mr. Louis Steibel and the testator were present when I signed. I waited in the adjoining room while Mr. Duclos was writing the will, about two hours. I saw Nicholas Fausz, the testator, sign his name to this will marked 'Exhibit A.' He signed it in my presence. I was standing by the table when he signed it. At the time of signing the testator was of sound mind and memory, and I believe so yet."

Louis Steibel, being sworn, on oath, testified as follows:

"Age, forty-six years; residence at Prairie du Rocher precinct; occupation, farmer; I saw this paper marked 'Exhibit A' before; it is the last will of Nicholas Fausz. I signed the name of Louis Steibel as a witness. He said 'this is my last will.' He was standing right behind me and saw me sign it. I noticed that a portion of the will was below my signature when I signed; all that is on there now was on there then. Mr. Duclos, Mr. Otto Hogemiller and the testator were present when I signed my name to the will as I have stated. Waited fully two hours in an adjoining room while Mr. Duclos wrote the will. Nicholas Fausz signed his name to the will in my presence. I was standing right behind him at the table when he signed it. Believed him of sound mind then, and believe so now."

With the exception of the inventory and appraisement bill, the foregoing was all the evidence; plaintiffs in error, the contestants, offered no evidence.

It is not claimed in this case by counsel for plaintiffs in error, that there was any want of due formality or any defect in the act of signing and attesting, nor that there was any want of mental capacity, or any fraud, compulsion or other improper conduct practiced or present at the time of the execution of the instrument, but as we understand them their contention is, that the position on the paper of the attesting clause and signature of the testator, with reference to clauses "Ninth" and "Tenth," conclusively estab-

lished the fact that these clauses are not parts of the will, that as to these clauses the requirements of the statute with reference to signing and attesting have not been complied with, and therefore are void; and that it is not permissible to show by parol evidence that these clauses were parts of the will as it was at the time of the signing and attesting.

The statute with respect to the execution of wills, is:

“All wills, testaments and codicils, by which any land, tenements, hereditaments, annuities, rents or goods and chattels are devised, shall be reduced to writing, and signed by the testator or testatrix, or by some person in his or her presence, and by his or her direction, and attested in the presence of the testator or testatrix, by two or more credible witnesses.”

With respect to the signing, this statute simply follows the statute of frauds; imposes the same requirements; shall be in writing, shall be signed. The present English statute and the statutes of some of the American states are different from ours and require the will to be signed “at the end thereof;” other of the states have statutes peculiar to themselves with respect to the signing of wills, and these facts produce apparent conflict of authority to one who merely glances through general indices, digests and syllabi, but under our statute and all others that, like it, require no more than is required by the statute of frauds, there is no conflict. In such jurisdictions the rule is, it is immaterial where, in the will, the signature of the testator is placed, if it was placed there with the intention of authenticating the instrument; and in the absence of statutory provision to the contrary, it is immaterial upon what part of the instrument the attesting witnesses sign their names. *Am. & Eng. Ency. of Law*, Vol. 29 (1st Ed.) 161; *Schouler on Wills* (2d Ed.), Sec. 312; *Beach on the Law of Wills*, Sec. 31; *Horner's Probate Law*, Sec. 41. As to place of signature of attesting witnesses, see *Jarman on Wills*, Vol. 1 (6th Ed.), 117 and 87; *Am. & Eng. Ency. of Law*, Vol. 29 (1st Ed.), 127-8; *Schouler on Wills* (2d Ed.), Sec. 335; *Beach on the Law of Wills*, Sec. 44.

Counsel's final and principal contention is that oral evidence is not admissible to show that the clauses under con-

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test were parts of the instrument at the time the testator signed and published it as his will, and that in no event was it proper to permit any but the attesting witnesses to testify. In this connection it must be borne in mind that this is not a proceeding in the County Court to admit the will to probate, nor is it an appeal to the Circuit Court from an order of the County Court admitting the will to probate, but it is to all intents and purposes a bill in chancery to contest the validity of the will. In such case it is always proper to show the state and condition of the instrument and all that transpired at the time of its execution as of the *res gestæ*, and this may be shown by any competent witness, whether he be a subscribing witness or not. This rule, in this character of proceeding, is universal. A comparatively recent application of it by our own Supreme Court is found in a case much analogous in its controlling features to the case at bar. *Shaw v. Camp*, 163 Ill. 144. This case is in direct line and harmony with the universal practice in such cases.

The testimony admitted by the trial court was competent and proper, and standing as it does wholly uncontradicted and unimpeached, is conclusive. This record contains no error.

The decree of the Circuit Court is in accordance with both law and equity, and is affirmed.

Provident Savings Life Assurance Society v. Isaac Cannon, Adm'r.

1. PRACTICE—*Breach of Warranties or Representations Must Be Pleaded in Defense.*—In a suit on a life insurance policy, where the plaintiff produces the policy, the identity of which is admitted, and proofs of death duly executed, and a letter from the company acknowledging receipt of proofs of death in due time, all of which are offered and admitted in evidence without objection, a *prima facie* case is made out in his favor. To avail himself of such matters as appear in the

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application without regard to whether they are warranties, or representations merely, their falsity or a breach by the assured must be set up and proved by the defendant as matter of defense.

2. *SAME—Commission to Take Depositions Must Be Followed.*—A commission to take depositions may specifically name any competent, disinterested person, or it may designate generally any judge, any master in chancery, justice of the peace, notary public, or it may designate any judge, master in chancery, justice of the peace or notary public; or it may designate a particular person; as A B; or any judge, master in chancery, notary public or justice of the peace, etc. In whatever form the commission runs, it can only be executed by the commissioner named in the commission or designated therein. He must be a person expressly named in the commission, or he must be a person of a class expressly designated in the commission. He gets his power to act from the commission and must be embraced within its language.

3. *CONSTRUCTION OF CONTRACTS—Is for the Court.*—The construction of a contract for insurance as well as of other contracts is for the court. In the interpretation of a contract the purpose of the transaction between the parties must be rightly apprehended, and the contract be so construed as to effect that purpose, if it be possible so to do, by giving to the language of the contract, as a whole, any reasonable meaning.

4. *SAME—Insurance Contract is One of Indemnity.*—The predominant intention of the parties in a contract of insurance is indemnity, and this intention is to be kept in view and favored in putting a construction upon the policy. Having indemnity for its object, the contract is to be construed liberally to that end, and it is presumably the intention of the insurer that the insured shall understand that in case of loss he is to be protected to the full extent which any fair interpretation will give. Conditions and provisos will be strictly construed against the insurers, because they have for their object to limit the scope and defeat the purpose of the principal contract.

5. *SAME—Insurance Contract To Be Construed Liberally in Favor of Promisee.*—If there is any doubt, in view of the general tenor of the instrument of writing, whether the words used therein are to be taken in an enlarged or restricted sense, all things being equal, that construction should be taken which is most beneficial to the promisee. This rule of construction is especially applicable to the construction of policies of insurance.

6. *WARRANTIES—Construction of.*—The rule that a warranty, if affirmative, must be strictly and exactly true, and if promissory, must be literally fulfilled, and that it binds the assured as made, no matter whether the breach proceeds from fraud, negligence, misinformation, or to what cause non-compliance is attributed, is an exceedingly harsh rule, and courts universally hesitate to apply it, except where, after considering all the language pertaining to the contract together, it is apparent that both parties so understood and intended it. If it be at all

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doubtful in meaning or contains contradictory provisions, or any statement from which the assured might have been led to believe that his policy would not be rendered void by reason of the fact that after his death it might be found that some of his statements, though honestly made, "were untrue in the slightest particular," then the courts will not hold that the statements are strict affirmative warranties, though it may be so stated in some part or parts of the contract.

7. *INSURANCE POLICY—Where Agent Has Knowledge of Irregularity.*—An insurance company can not insist upon the forfeiture of a policy for any cause within the knowledge of its agent at the time the policy was issued.

8. *INSURANCE—Materiality of Facts Concealed in Application—Question of Fact.*—To be of avail as a defense, defendant must prove that such answers and statements, or one of them, are fraudulent or untrue; that applicant knew that they were false at the time they were made; and that the fact concealed or the falsehood expressed was material to the risk; and these questions are all questions of fact for the jury to determine.

Assumpsit, on a life insurance policy. Appeal from the Circuit Court of Crawford County; the Hon. ENOCH E. NEWLIN, Judge presiding. Heard in this court at the February term, 1902. Affirmed. Opinion filed September 11, 1902.

OTIS H. WALDO and CALLAHAN & JONES, attorneys for appellant.

In the absence or sickness of the officer designated to take depositions, another officer empowered by law may be substituted. *Cole v. Choteau*, 18 Ill. 439; *Brown v. Luehrs*, 79 Ill. 581; *Stowell v. Moore*, 89 Ill. 564; *Brackett v. Nirkirk*, 20 Ill. App. 527.

A warranty must be exactly fulfilled and literally true. *Prudential Ins. Co. v. Friedericks*, 41 Ill. App. 419; *Bloomington M. L. B. Ass'n v. Cummins*, 53 Ill. App. 530; *Conn. Mut. L. I. Co. v. Young*, 77 Ill. App. 440.

Where the answers in the application are warranties, and any of them are untrue, evasive, or so made as to conceal any fact fairly called for by the questions, whether intentional or not, there can be no recovery. *Morgan v. Bloomington M. L. B. Ass'n*, 32 Ill. App. 79; *Bloomington M. L. B. Ass'n v. Cummins*, 53 Ill. App. 530; *Conn. M. L. I. Co. v. Young*, 77 Ill. App. 440; *Cont. L. I. Co. v. Rogers*, 119 Ill. 482.

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A misrepresentation of a material matter about which specific inquiry has been made, exonerates the insurer. *Bloomington M. L. B. Ass'n v. Cummins*, 53 Ill. App. 537; *Thomas v. Fame Ins. Co.*, 108 Ill. 91.

Only notice which is given to the agent at the time of the application for insurance, of facts material to the risk, will prevent the insurer from insisting upon a forfeiture for causes within the knowledge of the agent. *Phenix Ins. Co. v. Hart*, 149 Ill. 522; *Home Ins. Co. v. Mendenhall*, 164 Ill. 466; *Atlantic Ins. Co. v. Wright*, 22 Ill. 473; *F. & M. I. Co. v. Chesnut*, 50 Ill. 116; *Com. I. Co. v. Ives*, 56 Ill. 402; *Andes Ins. Co. v. Fish*, 71 Ill. 620; *St. P. F. & M. I. Co. v. Wells*, 89 Ill. 82; *American Ins. Co. v. Luttrell*, 89 Ill. 314.

No formal declaration of forfeiture of an insurance policy upon breach of a condition therein contained is necessary, but it will be sufficient to set up such breach when sued for the loss. *U. S. Life Ins. Co. v. Ross*, 159 Ill. 488; *Schimp v. Cedar Rapids I. Co.*, 124 Ill. 354.

GEE & BARNES, J. E. MCGAUGHEY and BRADBURY & MAC-HATTON, attorneys for appellee.

"When an assured fully discloses to the agent the necessary facts, or the company becomes otherwise cognizant of them, they are estopped to deny the liability on such grounds." *Andes Ins. Co. v. Fish*, 71 Ill. 620; *Globe Mutual Ins. Co. v. Wagner*, 90 Ill. App. 444.

"When the assured disclosed the facts to the agent, and the agent wrote down the answers to the questions in the application, the company can not avoid the policy on the ground of warranties." *Phenix Ins. Co. v. Stocks et al.*, 149 Ill. 319; *Rockford Ins. Co. v. Nelson*, 65 Ill. 415; *Home Ins. Co. v. Mendenhall*, 164 Ill. 458; *Michigan Mutual Ins. Co. v. Leon*, 37 N. E. Rep. 584; *Hart v. Niagara Ins. Co.*, 38 Pac. Rep. 213.

MR. JUSTICE CREIGHTON delivered the opinion of the court.

This was an action of assumpsit, in the Circuit Court of Crawford County, by appellee against appellant, to recover

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on a life insurance policy. Trial by jury. Verdict and judgment in favor of appellee for \$5,404.16. In connection with their general verdict, the jury returned answers to special interrogatories submitted on behalf of appellant, as follows:

"1. Did the insured, William Cannon, at the date of the application for the policy here sued on, or had he previously thereto, had paralysis? A. No. 4. Did the insured, William Cannon, have unconsciousness at any time before the date of the application for the policy here sued on? A. No. 5. Did the insured, William Cannon, ever have any sickness, injury or infirmity whatever, which was not named in the application for the policy here sued on? A. No. 6. Was or was not Dr. H. W. Ziegler the usual medical attendant of the insured, William Cannon? A. Yes. 7. Was the insured, William Cannon, insured in any company or society other than the *Ætna Life*, at the date of his application for the policy here sued on? A. No. 10. Had any company or association ever refused to issue a policy of insurance on the life of the insured, William Cannon, before the application was made for the policy here sued on? A. Yes. 13. Was William Cannon in his usual health, good and sound, at the time he made application for the policy here sued on? A. Yes."

And the jury also returned answers to special interrogatories submitted on behalf of appellee, as follows:

"1. Was John J. Buchanan the agent of defendant at the time he took the application for insurance of William Cannon? A. Yes. 2. At the time, did he know that the said William Cannon had in November, 1896, a stroke of paralysis? A. Yes. 3. At the time, was he acquainted with the fact of the sickness of William Cannon in November, 1896? A. Yes. 4. Did the said John G. Buchanan know when he took the application, that Cannon had been refused insurance by *Des Moines Life Association*? A. Yes. 5. Did the said John G. Buchanan write the answers in the application? A. Yes. 6. Did he read them over to the said William Cannon? A. No. 7. Did said William Cannon make any false answers or suppress any material facts to either John G. Buchanan or the medical examiner? A. No. 8. Did Dr. Pinkstaff, the medical examiner, know of the sickness of William Cannon in 1896, before he sent in the application? A. Yes. 9. Did the

medical examiner know of the fact of the rejection of Cannon by the Des Moines Life Association or other companies before he sent in the application? A. Yes."

The declaration was in the usual form. To the declaration appellant pleaded the general issue, and the parties entered into a stipulation to the effect that either party might offer any proofs which would be competent under any special plea, and any proper replication thereto, in the same manner as if such special pleas and replications had been filed. The defense relied on by appellant, as stated by its counsel, was, "that the application was in express terms made a part of the contract of insurance, and the answer of the applicant to questions asked in the application were warranted to be true, but that some of the applicant's answers to the questions asked in the application were in fact fraudulent or untrue." Among the questions and answers contained in the application are the following:

"Have you now or have you ever had apoplexy? No. Dizziness or vertigo? No. Paralysis? No. Unconsciousness? No. Have you ever had any sickness, injury or infirmity whatever, not already named? If so, state the number of attacks, and the date, location and duration of each. Ans. No. Give the name and residence of your usual medical attendant. Ans. Dr. Camplain, Russellville, Illinois. When and by what physicians were you last attended, and for what complaint? (Answer fully and specifically.) Dr. Camplain. Billious attack. Has any company, society or benefit organization rejected or limited your application for insurance? Particulars required. Ans. No. Has application to grant or restore assurance on your life ever been made which was not complied with in the form and amount asked for? If so, state every such case, when, and the cause and causes. Ans. No."

Appellant's counsel contend the above quoted answers were fraudulent or untrue in this, that the assured, in 1896, was sick; that he was on that occasion unconscious and that he then had apoplexy; that in 1897 he made application to the Des Moines Life Association of Des Moines, Iowa, and that this application was rejected, and that Dr. Camplain of Russellville, Illinois, was not his usual medical attendant.

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Upon the trial in the Circuit Court, appellee produced the policy, the identity of which was admitted, and proofs of death duly executed, and a letter from appellant acknowledging receipt of proofs of death in due time, all of which were offered and admitted in evidence without objection, and here appellee rested. This, under the issues as raised in the pleadings, made a *prima facie* case in favor of appellee. In such case it is not necessary for the plaintiff to either allege or prove such matters as appear in the application, only. To be availed of, without regard to whether they are warranties, or representations merely, their falsity or a breach by the assured must be set up and proved by the defendant as matter of defense. *Herron v. Peoria Life Insurance Co.*, 28 Ill. 235; *Illinois Insurance Co. v. Stanton*, 57 Ill. 354; *Mutual B. Life Ins. Co. v. Robertson*, 59 Ill. 123; *Grange Mill Co. v. Western Assurance Co.*, 118 Ill. 396; *Continental Life Insurance Co. v. Rogers*, 119 Ill. 474; *Globe Life Insurance Ass'n v. Wagner*, 188 Ill. 133.

Appellant produced and put in evidence the application, consisting of three parts: "Part 1" expresses a request for assurance upon the life of the appellant, in the sum of \$5,000, and embraces twenty-four questions and answers, and the following:

"I hereby warrant and agree on behalf of myself, and for any person who shall have or claim any interest in any policy issued under this application, as follows: 1. That I will not within two years from the date of the policy to be issued under this application, travel or reside in any part of the Torrid Zone, or north of the parallel of sixty degrees north latitude, and that I will not during said two years, personally engage in blasting, mining, submarine labor, aeronautic ascensions, the manufacture, handling or transportation of highly inflammable or explosive substances, or serve upon any vessel, boat or railroad, or other hazardous occupation, except upon the written permission of the society in every such case. 2. That self-destruction, whether sane or insane, voluntary or involuntary, or death resulting from actual or attempted violation of law, are risks not assumed by the society within said two years. In any distribution of surplus or apportionment of profits, the principles and methods which may be adopted by the society

for such distribution or apportionment, and its determination of the amount to be so distributed or apportioned, and of the amount belonging to any policy which may be issued under this application, shall be conclusive upon the assured under said policy and upon all parties having or claiming any interest thereunder. 4. That the proofs of death required shall be made upon the blanks furnished by the society, and shall include all information required thereby. That all provisions of law forbidding any physician who has or shall have attended me from disclosing any and all information which he acquired by such attendance, are hereby expressly waived, and such waiver is a part of the consideration for any policy to be issued hereunder. 6. That the contract contained in the policy to be issued hereunder, and in this application, shall be construed according to the laws of the State of New York. That all the statements contained in part I and part II of this application, by whomsoever they are written, are warranted to be full, true and complete, and with the stipulated premium and the waiver hereinbefore mentioned shall be the sole consideration of the contract with the society if any policy or policies be issued, reinstated or renewed thereon, and that if any concealment, or fraudulent or untrue statement be made, or if at any time any covenant or agreement herein made shall be violated, said assurance shall be null and void; and all payments made or accepted on account thereof shall be forfeited to the society, except to the extent as provided in said policy; and that the society shall incur no liability under this application until it has been received, approved, the policy issued thereon by the society at the home office, and the premium has actually been paid in cash to and accepted by the society, or its duly authorized agent, during my lifetime and good health."

Three of the questions and answers embraced in this part of the application are: "Age at nearest birthday? Sixty." "Do you agree that no statements, promises, or information, made or given by, or to, the person soliciting or taking this application for a policy, or by or to any other person, shall be binding on the society, or in any manner affect its right, unless such statements, promises or information be reduced to writing and presented to the officers of the society at the home office with this application, and no agent of the society shall have power to waive any of the terms and conditions of any policy to be issued hereunder, or to accept in payment of the first premium, under such policy, anything except cash? Yes." "Has appli-

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cation to grant or restore assurance on your life ever been made which was not complied with in the form and amount asked for? If so, state every such case, when, and the cause or causes. No."

"Part II. Statements to the Medical Examiner." This part contains more than fifty questions and answers. Among such questions and answers are: "Place and date of birth? Crawford county, Illinois, November 22, 1839. Have you now, or have you ever had, apoplexy? No. Paralysis? No. Dizziness or vertigo? No. Unconsciousness? No. Have you ever had any sickness, injury or infirmity, whatever, not already named? If so, state the number of attacks, and the date, location and duration of each. No. Give the name and residence of your usual medical attendant? Dr. Camplain, Russelville, Illinois. When and by what physician were you last attended, and for what complaint? Answer fully and specifically. Dr. Camplain; bilious attack. Has any company, society or benefit organization rejected or limited your application for assurance? Particulars required. No." And this part contains the following: "I hereby declare that I have read and understand all the above questions and the answers thereto, and they are hereby made part of my application for assurance by the Provident Savings Life Assurance Society of New York, and I hereby warrant said answers, as written, to be true, and that I am the person described above, and in part I of this application, signed by me. William Cannon, person examined. Witness, J. T. Pinkstaff, M. D. Dated this 24th day of August, 1899."

"Part III. Medical Examiner's Report." On the back of part III is the following: "The medical examiners of this society are officers regularly commissioned in the society's service." On the face of this part is a direction, as follows: * * * "The examining physician is required to explain any of the answers, where space did not permit, and make such other memoranda as he may deem necessary to a full understanding of the case." In this part of the application the medical examiner answers more than thirty questions, some of which, with his answers thereto, are: "How long have you personally known the applicant? Ten years. Does the applicant's appearance indicate good health? Yes. What is your opinion as to his occupation? Farmer. What is your opinion as to the effect upon his constitution of any former injury or sickness? Good. Are his statements in part II, as to the use of stimulants or nar-

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cotics, in your opinion, complete and truthful? Yes. Are the brain and nervous system entirely free from tendency to or indications of disease? Yes. Are the heart and blood vessels free from any indications of disease? Yes. Do you recommend the risk? Yes. Under the classification given on the opposite page, how do you rate the party? Class A." (This class includes only those "in perfect health.") "Was the examination made in private, and with no person present except yourself and the applicant? Yes." To this is added: "I hereby declare that I have this day carefully examined the above named person, being the same person described in parts I and II of this application; that I have attentively considered the statements made by him therein, and have myself written those in part II, and have seen him write his signature thereto. Examined at his residence, Crawford Co., Ill., the 24th day of August, 1899. Hour, 2 P. M. J. F. Pinkstaff, M. D., medical examiner for society."

The policy issued to the assured in pursuance of the application above mentioned and quoted from, contains the following: "This assurance is granted in consideration of the statements and agreements in the written and printed application for this policy, which is hereby made part of this contract; and of the payment of two-hundred and ninety-two and 30-100 dollars on or before the ninth day of September, in every year during the continuance of this policy;" and on the back thereof is, among other conditions, the following: "Due proof of the age of the assured must be submitted with proofs of death, and the amount of the assurance due under this policy at its maturity, shall in no case be more than the premium charged would have purchased at the society's rates in use at the date of issue of this policy for the assured's true age;" and also: "This policy and the application herefor, taken together, constitute the entire contract. Agents are not authorized to make, alter or change the contract or to waive any forfeiture thereof, or to extend this assurance, or to grant permits, or to bind the society in any way."

The construction of a contract for insurance as well as of other contracts is for the court. In the interpretation of a contract, the purpose of the transaction between the par-

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ties must be rightly apprehended and the contract be so construed as to effect that purpose, if it be possible so to do, by giving to the language of the contract, as a whole, any reasonable meaning. In Phillips on Insurance at Sec. 124, it is said :

“The predominant intention of the parties in a contract of insurance is indemnity, and this intention is to be kept in view and favored in putting a construction upon the policy.”

In May on Insurance, Vol. 1, 3d Ed., at Sec. 174, it is said:

“Having indemnity for its object, the contract is to be construed liberally to that end, and it is presumably the intention of the insurer that the insured shall understand that in case of loss he is to be protected to the full extent which any fair interpretation will give. * * * Conditions and provisos will be strictly construed against the insurers because they have for their object to limit the scope and defeat the purpose of the principal contract.”

In Wood on Fire Insurance, at Sec. 59, it is said :

“It is the duty of the insurer to clothe the contract in language so plain and clear that the insured can not be mistaken or misled. * * * Having the power to impose conditions and being the party who draws the contract, he must see to it that all conditions are plain, easily understood, and free from ambiguity. * * * Failing to employ a clear and definite form of expression, the benefit of all doubts will be resolved in favor of the assured. The courts will not permit the assured to be misled or cheated where there is any sort of justification, from the language used, for the interpretation placed by him upon the instrument. A contract drawn by one party, who makes his own terms and imposes his own conditions, will not be tolerated as a snare to the unwary, and if the words employed, of themselves, or in connection with other language used in the instrument, or in reference to the subject-matter to which they relate, are susceptible of the interpretation given them by the assured, although in fact intended otherwise by the insurer, the policy will be construed to favor the assured.”

In Vol. 1, 2d Ed., Wood, page 145:

“If there is any doubt, in view of the general tenor of the instrument of writing, whether the words used therein are to be taken in an enlarged or restricted sense, all things

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being equal, that construction should be taken which is most beneficial to the promisee. This rule of construction is especially applicable to the construction of policies of insurance."

The courts of this state have adopted and emphasized the above quoted principles and rules for the interpretation and construction of insurance contracts. *Hardesty v. Forest City Ins. Co.*, 77 Ill. App. 413; *Teutonia Ins. Co. v. Bonner*, 81 Ill. App. 231; *Detroit F. & M. Ins. Co. v. Chetlain*, 61 Ill. App. 450; *Illinois Mut. Ins. Co. v. Hoffman*, 31 Ill. App. 295; *Commercial Ins. Co. v. Robinson*, 64 Ill 265; *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64; *Niagara Ins. Co. v. Scammon*, 100 Ill. 644; *Schroeder v. Trade Ins. Co.*, 109 Ill. 157; *Healey v. Mutual Accident Ass'n*, 133 Ill. 556; *Traveler's Ins. Co. v. Dunlap*, 160 Ill. 642; *The Niagara Fire Ins. Co. v. Heenan & Co.*, 181 Ill. 575; *Globe Mut. Life Ins. Ass'n v. Wagner*, 188 Ill. 133.

Appellant's counsel contend that it is the duty of the court to so construe the contract in this case as to make each and all the answers appearing in parts I and II of the application strict affirmative warranties, so as to bring the case under the rule:

"A warranty in a contract of insurance must, if affirmative, be strictly and exactly true, and if promissory, must be literally fulfilled; the validity of the entire contract depends thereon, otherwise it becomes void. No departure can be allowed in the slightest particular in any matter warranted. The very purpose and meaning of a warranty is to preclude all questions for what purpose it was made, or whether it was made for any purpose at all by the insured. Once it is inserted in the policy, or made a part thereof by proper reference, it binds the assured as made, it matters not whether the breach proceeds from fraud, negligence, misinformation, or to what cause non-compliance is attributed. If it be an affirmative warranty, and is false, there is a breach; and if it be promissory and is not strictly performed, the contract is void."

If the statements are strict affirmative warranties, they will be deemed and held to be material whether they are so in fact or not, and if shown to be "untrue in the slightest

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particular" there can be no recovery on the policy, without reference to whether such statements were intentionally or innocently made; for if false, they may be availed of by the insurer to render the policy void, although the insured may have believed them to be true.

Counsel for appellee contend that the court should so construe the contract as to make the answers representations in contradistinction from warranties, so as to bring the case under the more liberal rule :

"To avail as a defense it must be averred and proved that the statements were false, that the insured at the time of making them knew they were false, or made them so recklessly or under such circumstances as that in good conscience willful falsehood should be imputed to him, and that the fact concealed or the falsehood expressed was material to the risk."

The rule invoked by appellant's counsel is an exceedingly harsh rule and courts universally hesitate to apply it—will not apply it, except where, after considering all the language pertaining to the contract together, it is apparent that both parties so understood and intended it. If it be at all doubtful in meaning or contains contradictory provisions, or any statement from which the assured might have been led to believe that his policy would not be rendered void by reason of the fact that after his death it might be found that some of his statements, though honestly made, "were untrue in the slightest particular," then the courts will not hold that the statements are strict affirmative warranties, though it may be so stated in some part or parts of the contract. *Joyce on Insurance*, Vol. 3, Sec. 1957; *Globe Mutual Life Ins. Ass'n v. Wagner*, 188 Ill. 133; *Continental Life Ins. Co. v. Rogers*, 119 Ill. 474; *Illinois Mason's Benevolent Society v. Winthrop*, 85 Ill. 537; *Northwestern Benevolent and Mutual Aid Ass'n v. Cain*, 21 Ill. App. 471; *Continental Life Ins. Co. v. Thoena*, 26 Ill. App. 495; *Moulor v. American Life Ins. Co.*, 111 U. S. 335. When all the writings pertaining to the contract of insurance involved in this case are considered together in the light of the environment under which they were executed, it is a fair and just inter-

pretation to put upon them, to hold, as we do, that the answers and statements made by the assured were not intended or understood by him to be strict affirmative warranties. The nature and purport of many of the questions were such that no man could have, of his own knowledge, absolutely correct information concerning them. He was therefore warranted in believing that he was only required to truthfully answer according to his understanding and recollection. It can not be believed by any disinterested, intelligent person, that the assured, in answering the questions, for instance, as to the ages, respectively, of his paternal grandfather, paternal grandmother, maternal grandfather and maternal grandmother, at the respective dates of their deaths, understood and intended that if after he had paid for his insurance up to the date of his own death, and been by death deprived of the opportunity of defending his earthly estate, it should be made to appear that any one of those long buried ancestors had died at an age, one year, or one day even, younger or even older, than the age stated in his answer, that his policy should be absolutely void. The questions and answers in part III of the application clearly show that appellant did not rely and act upon the assured's answers and statements as absolutely true and free from possibility of error or mistake. They inquire of the medical examiner as to the length of time he had personally known assured, and as to his opinion of the truth of the statements, etc., and further, when appellant had received the application at its home office, duly examined and considered it, placed its own construction upon it and approved the risk, it forwarded to the assured the policy, upon the back of which as one of the conditions, being the provision, that, "due proof of the age of the assured must be submitted with the proofs of death, and the amount of the assurance due under this policy at its maturity, shall in no case be more than the premium charged under this policy would have purchased at the society's rates in use at the date of issue of this policy for the assured's true age." When the policy containing this provision was tendered to

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the assured and the premium demanded, was he not warranted in believing that if he had made an honest mistake, through ignorance, lapse of memory or otherwise, in answering questions, this would not render his policy absolutely void, and does this not also evidence that appellant then so understood it?

The construction we have given the contract eliminates many of the questions raised and argued, and such of them as we deem of importance and not so disposed of we will discuss, but not in the order in which they are presented by counsel.

The testimony shows that in the month of November, 1896, the assured had an attack of sickness; that on this occasion he was in a semi-conscious condition, in a stupor, and remained so for about two days, and that it was about three or four or five days before he could walk unassisted; that he was sick about eight or ten days and after that he attended to his duties on the farm as usual and looked after his business. Some of the witnesses think from his appearance that he never did fully recover from that attack, while others think he did. Appellant's medical examiner, who had been personally acquainted with him for ten years, states in his report of the examination that he was at that time in perfect health, and rated him in class "A," and Dr. Ziegler, the physician who treated the assured during this attack in 1896, states that he never told assured that he had apoplexy or paralysis, that it might have been the result of some malarial trouble. He thought assured had recovered from the trouble—he had recovered from the acute symptoms; that a man does not ordinarily recover in two or three or four days from a stroke of paralysis. The stupor that he found the assured in might have been occasioned by other things than apoplexy or paralysis. It might have been the result of indigestion or over-eating, or other sickness of some kind. There is testimony tending to show that after the attack of sickness in 1896, the assured, in speaking of it, stated that he had had something like apoplexy. In this connection, and also for the purpose

of establishing the fact that the assured had been rejected by another insurance association, appellant introduced the depositions of the president and of the medical director of Des Moines Life Association, and duly identified and introduced an application, by the assured, for insurance in the latter named association, of date July 21, 1897. This application was rejected because of the statements in it that applicant had an attack of paralysis on the 19th day of November, 1896. In this application the assured answered that he had "slight paralysis of left side November 19, 1896," and that Dr. Ziegler was his physician on that occasion. Dr. Ziegler was the examining physician who made the examination and report on the application to the Des Moines Life Association, and states that he wrote down the answers as the applicant gave them, and that the applicant signed his name to the application.

As to the making of the application to appellant society, which it is claimed by appellant contains such fraudulent and untrue answers and statements as render the policy here sued on, wholly void, John G. Buchannan, appellant's agent who solicited the insurance, took the application and delivered the policy, testifies: "This paper (indicating the application) is an application for insurance to Provident Savings Life Assurance Society of New York;" that he took the application and the assured signed it; that he was then soliciting insurance for appellant, and acted in that capacity from April, 1898, to January, 1901; that his duties were to solicit applications, collect premiums and deliver the policies; that he, the agent, wrote down the answers and that the assured did not read over the application either before or after he signed it. Question No. 23 in this application says: "Has application to grant or restore assurance on your life ever been made, which was not complied with in the form and amount asked for? If so, state every such case, when, and the cause or causes." Question to the witness: "Now, I will ask you whether you read over to Mr. Cannon at the time this application was taken, this question No. 23? A. I don't think I did." That the assured told him either

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before or about that time that he had been rejected for insurance by the Des Moines Life Association; that he told assured that a rejection by the Des Moines Life Association was not a rejection, and that was why the assured answered this way; that he, the agent, knew of the rejection prior to the writing of the application; that Dr. Pinkstaff made the medical examination upon the application to appellant in the case at bar; that he and Dr. Pinkstaff drove in a buggy to assured's house; that they, the agent and medical examiner, had talked together before about Cannon's insurance, and on the way over he told Dr. Pinkstaff that Cannon, the assured, had been rejected by an assessment company and that he did not think it necessary to mention that as they, assessment companies, were not considered authority on insurance, and Dr. Pinkstaff told him he would take care of that; that he, the agent, had been informed that the assured had had a spell of sickness in 1896; that he wrote down the assured's answers correctly so far as he gave them, and that he also wrote down answers which the assured did not give; that he does not know how many answers he wrote down which the assured did not give; that he did not read over to the assured all the questions, but that he did read over to him some of them; that he does not know how many nor which ones of the questions he did not read over to the assured; can't pick out any question and say that he did or did not read that particular question to him; that it was generally known at the time the application was taken that the assured was sick in 1896.

Appellant is a corporation, and as such can act only through agents. Buchannan and Pinkstaff, who participated in the making of the application upon which the policy in this case is based, were both agents of appellant, with full power to act in the capacity in which they did act. Before the application was made they had knowledge of the facts that the applicant had been rejected by the Des Moines Life Association, and that he had an attack of sickness in 1896. Their knowledge, and especially the knowledge of

Buchanan, was appellant's knowledge. When the application is filled out, with a knowledge on the part of the agent of the facts, whether such knowledge be communicated by the applicant, or the agent had become "otherwise cognizant of them," though the application be signed by the applicant, still, if there be no collusion between the agent and the applicant, the application in such case is as much the act of the insurance company as of the assured, and the company will not be permitted to avail itself of a false or erroneous statement in the application concerning such facts. An insurance company can not insist upon the forfeiture of a policy for any cause within the knowledge of its agent at the time the policy was issued. *Globe Mut. Life Ins. Ass'n v. Ahern*, 191 Ill. 167; *Security Trust Co. v. Tarpey*, 182 Ill. 52; *Phenix Ins. Co. v. Stocks*, 149 Ill. 319; *Rockford Ins. Co. v. Nelson*, 65 Ill. 415; *Reaper City Ins. Co. v. Jones*, 62 Ill. 458; *Andes Ins. Co. v. Fish*, 71 Ill. 620; *Atlantic Ins. Co. v. Wright*, 22 Ill. 462; *Metropolitan Life Ins. Co. v. Larson*, 85 Ill. App. 143. And with reference to the answers and statements of the assured above discussed as well as to those concerning the assured's usual medical attendant, without reference to either the law or fact of waiver or estoppel, to avail as a defense it devolves upon appellant not only to prove that such answers and statements, or one of them, are fraudulent or untrue, that applicant knew that they were false at the time they were made, and that the fact concealed or the falsehood expressed was material to the risk; and these questions are all questions of fact for a jury to determine. *Ætna Life Ins. Co. v. King*, 84 Ill. App. 171; *Metropolitan Life Ins. Co. v. Larson*, 85 Ill. App. 143; *Globe M. Life Ins. Ass'n v. Wagner*, 188 Ill. 133; *Continental Life Ins. Co. v. Rogers*, 119 Ill. 474.

It is insisted that the trial court committed many errors in the giving, modifying and refusing of instructions. These need not be discussed in detail. The principal questions raised as to the instructions are involved in the foregoing discussion. While the instructions are not, in all respects, technically accurate, they are in harmony with the law

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applicable to the controlling facts of this case, as we hold it to be, and are not inaccurate, in any respect, to a degree calculated to mislead the jury. In connection with this branch of the case, it is contended that the court erred in refusing to submit to the jury special interrogatories Nos. 3, 8, 9, 11 and 12, asked on behalf of appellant. Nos. 3, 9, 11 and 12 are fully covered by Nos. 1, 5 and 10, of those submitted at the instance of appellant, and the question involved in No. 8 was not so developed by the evidence as to become a controlling issue in the case.

Counsel contend that the trial court erred in suppressing two certain depositions taken and produced on behalf of appellant, and that for this error the case should be reversed. The record discloses that appellant sued out a commission to take the depositions upon oral interrogatories of two witnesses who resided at Detroit, Michigan. The notice and commission is to take the depositions of Charles E. Foote and Thomas Dillon. The commission appoints James V. Oxtoby as commissioner, and authorizes him to take the depositions of the two witnesses named, at the office of the Michigan Mutual Life Insurance Company, in the city of Detroit, Michigan, on the 7th day of August, 1901, and from day to day until completed. The depositions produced are depositions of Charles E. Foote and George W. Sanders, and were taken by one Allister Cochrane, a notary public. These depositions were taken at the time and place required by the notice and commission, but appellee was not present, nor represented at the taking of them, nor did he, or any one for him, agree that the depositions might be taken by the notary, Cochrane. The commissioner, Oxtoby, was absent from the city at the time fixed by the commission for taking the depositions, and in the absence of appellee and his counsel appellant's counsel called in the notary public above mentioned and proceeded to take the depositions produced.

Appellant's counsel contend that in case of the absence or sickness of the commissioner named in the commission to take the depositions, any judge, master in chancery,

notary public or justice of the peace may act. The authorities cited and relied on do not sustain this position as applicable to the facts of this case. It is true that the notice need not contain the name of any person or class of persons as commissioners, but the commission must do so. It may specifically name any competent, disinterested person, or it may designate generally any judge, any master in chancery, any notary public, any justice of the peace; or it may designate any judge, master in chancery, justice of the peace or notary public; or it may designate any particular person, as A B, or any judge, master in chancery, notary public or justice of the peace, etc. In whatever form the commission runs, it can only be executed by the commissioner named in the commission or designated therein. He must be a person expressly named in the commission, or he must be a person of a class expressly designated in the commission. He gets his power to act from the commission, and must be embraced within its language. The commission in the case at bar empowers James V. Oxtoby alone to act, and neither mentions nor includes any other person or class of persons. The motion to suppress was made and sustained before the trial was commenced, and before the jury was called, and appellant did not ask a continuance for the purpose of retaking these depositions, neither was the action of the court in suppressing them stated in the motion or in any manner presented as a ground for new trial. It appears to us, upon the whole, that substantial justice has been done in this cause by the verdict and judgment, and that the record before us contains no such error as calls for a reversal of the case.

The judgment of the Circuit Court is affirmed.

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The Franklin Life Ins. Co. v. The People ex rel. James Yancey.

1. CONSTRUCTION OF STATUTES—*Chapter 73, Paragraph 27, Sec. 1, Hurd's R. S.*—Chapter 73, paragraph 27, section 1, Hurd's R. S., prohibits any life insurance company, or association organized under the laws of this state, or doing business within the limits of the same, from permitting any distinction, or discrimination between insurants of the same class and equal expectation of life, in its established rates, nor in the charging, collecting, demanding or receiving of the amount of premium for insurance of the same class and equal expectation of life; nor in the return ratably of the premium, dividends or other benefits accruing, or that accrue, to such insurants as aforesaid; nor in the terms and condition of the contract between any such company and the insurants; and provides that if any such insurance company or association, its agent or agents, as aforesaid, shall make any unjust discrimination, the same shall be deemed guilty of having violated the provisions of this act, and upon conviction thereof, shall, together with the agent or agents so unlawfully transacting its business, jointly and severally, be subject to a penalty of not less than \$500, or not more than \$1,000. *Held*, that the statute not only makes both corporation and agent liable, but expressly declares that the insurance company shall, together with the agent so unlawfully transacting said business, jointly and severally, be liable.

2. MASTER AND SERVANT—*Master Liable for Acts of Servant Within Scope of His Duty.*—While the servant is acting within the scope of his authority the master is liable for his acts, not only those which are merely careless or negligent, but also his willful and malicious acts.

Suit to Recover Statutory Penalty.—Appeal from the Circuit Court of Williamson County; the Hon. OLIVER A. HARKER, Judge presiding. Heard in this court at the August term, 1902. Affirmed. Opinion filed September 11, 1902.

WILLIAM W. CLEMENS, attorney for appellant.

A principal, whether an individual or a corporation, while liable civilly for damages for the fraud and deceit of an agent, is not liable criminally for the acts of the agent without evidence that the principal authorized, procured, or connived at the criminal conduct of the agent. *Am. & Eng. Ency. L.*, Vol. 1, (2d Ed.) page 1161, and notes citing cases; *Locke v. Stearns*, 1 Met. 560; 35 Am. Dec. 382; *Maisenbacker v. Society Concordia*, 71 Conn. 369.

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The insurance company has no interest in the proportion of the premium which belonged to the agent as his commission. *A. W. Quigg v. W. F. Coffy*, 18 R. I. 757; 30 Atl. Rep. 794; *Thompson v. New York Life Ins. Co.*, 21 Oregon, 466, 28 Pac. Rep. 628; *Lycoming F. Ins. Co. v. Ward*, 90 Ill. 549-550; *Hancock L. Ins. Co. v. Schlink*, 175 Ill. 284.

L. D. HARTWELL, state's attorney, and PILLOW & SMITH, attorneys for appellee; ED. M. SPILLER, of counsel.

Where agents or servants of a corporation act within the scope of their employment, the corporation will be responsible for their negligence, frauds, or willful and wrongful acts, although such acts are against the positive instructions of such corporations. *I. & St. L. R. R. Co. v. People*, etc., 91 Ill. 452; *C., B. & Q. R. R. Co. v. Jones*, 149 Ill. 361; *C. & E. I. R. R. Co. v. The People*, 120 Ill. 667; *The T. W. & W. R. R. Co. v. The People*, 81 Ill. 141; *Noecker v. People*, 91 Ill. 494; *N. Y. Life Ins. Co. v. The People*, 95 Ill. App. 144.

MR. JUSTICE WORTHINGTON delivered the opinion of the court.

This was a suit in the Circuit Court by appellee against appellant to recover the penalty for allowing rebates, or discriminations between life insurants of the same class from rates of life insurance established by the appellant life insurance company.

The declaration consists of three counts, all substantially the same, and alleges an issue of a life policy to one Edward L. Dwyer for \$1,000 by defendant company, acting through one H. C. Parr, agent, and charges an unjust distinction and discrimination in its established rates in favor of said Dwyer, and which discrimination was not embodied in said policy, etc.

The trial was by the court without a jury on a plea of not guilty. The defendant was fined \$500 and costs, from which this appeal.

The evidence showed that the charge to said Dwyer as the first annual premium, by the agent, Parr, was \$28.02,

when the regular rate for Dwyer's age was \$32.02 on a \$1,000 policy.

It does not appear that the company authorized, approved of, or connived at this action of its agent, or had notice of it.

There is no dispute as to the facts in the case.

Appellant urges a reversal of the judgment upon the grounds that the court refused to hold as law, four propositions duly submitted.

These propositions are as follows :

1st. "The court holds that the statute of Illinois under which this prosecution is sought to be maintained, which prohibits, under certain penalties, any discrimination by life insurance companies or rebates from their established rates for life insurance as between insureds of the same class or equal expectancy of life, does not authorize or warrant conviction of a life insurance company of the offense created by said act, where an agent of such insurance company canvassing for policies of insurance makes a discrimination between insureds of the same class, or allows, or offers rebates from the established rates of life insurance by said company, even where such agent is proven guilty of said offense, unless the evidence satisfactorily establishes the fact that the life insurance company authorized or knew of such criminal action by the agent, or colluded or connived at the agent's action, or approved, or consented to such agent's action in violating the statute in question."

"Refused."

2d. "The court hold a life insurance company doing business in the State of Illinois is not necessarily guilty of violating the statute of Illinois against discriminations between insureds of the same class, or making rebates from its established rates of life insurance between persons of equal expectancy of life, simply because it may be proven that its agent has violated the statute prohibiting such discriminations or rebates in life insurance; but before the insurance company could be lawfully convicted of said offense, it must be shown that the company either authorized the discriminations and rebates before such were made by the agents, if such discriminations or rebates were made by the agent of the company in fact, or that the company approved of such discriminations or rebates after they were made. And unless the evidence established that the defendant insurance company either authorized such discriminations or rebates before they were made, if any such

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are proven, or approved or ratified such after they were made, the finding should be for the defendant insurance company."

"Refused."

3d. "The court holds that it is a rule of law that a principal is not liable, criminally, for the acts of his or its agents, unless the evidence establishes the fact that the principal authorized or approved of the unlawful act of the agent."

"Refused."

4th. "The court holds that this being a penal action it is not sufficient to warrant a conviction, that the evidence preponderates in favor of the contention of the defendant's guilt, but the evidence must be clearly and satisfactorily convincing that the defendant is guilty of the charge, otherwise the finding should be not guilty."

"Refused."

The sections of the statute under which this judgment was rendered are as follows :

"No life insurance company, or association organized under the laws of this state or doing business within the limits of the same, shall make or permit any distinction or discrimination between insurants of the same class and equal expectations of life in its established rates, nor in the charging, collecting, demanding or receiving of the amount of premium for insurance of the same class and equal expectation of life; nor in the return ratably of the premium, dividends, or other benefits accruing, or that may accrue, to such insurants as aforesaid; nor in the terms and condition of the contract between any such company and the insurants; and such contract of insurance shall be fully and wholly expressed and contained in the policy issued and the application therefor; nor shall any such company or its agents pay, or allow, or offer to pay or allow, to any person insured, any special rebate or premium, or any special favor or advantage in the dividends or other benefits to accrue in such policy, or promise the same to any person as an inducement to insure, or promise to give any advantage or valuable consideration whatever, not expressed or specified in the policy of such company." Hurd's Revised Statutes, chapter 73, paragraph 27, Sec. 1.

"If any such insurance company or association, its agent or agents, as aforesaid, shall make any unjust discrimination, as enumerated in section one of this act, the same shall be deemed guilty of having violated the provisions of

this act, and upon conviction thereof shall be dealt with as hereinafter provided.

"Any such life insurance company or association which shall transact its business in this state in violation of the provisions of this act, shall, together with the agent or agents so unlawfully transacting said business, jointly and severally, be subject to a penalty of not less than five hundred dollars, or not more than one thousand dollars, to be sued for and recovered in the name of the people of the State of Illinois, by the state's attorney of the county in which such agent or agents may reside, or in the county in which the offense is committed. One-half of said penalty when recovered, shall be paid into the treasury of said county, the other half to the informer of such violation." Hurd's Revised Statutes, chapter 73, paragraphs 28 and 29, sections two (2) and three (3).

The third proposition might have been held as a general proposition of law, but as it is not applicable under the statute in this case, as we view it, there was no error in its refusal.

As there is undisputed evidence in support of the allegation that the agent of appellant did make a rebate, there is no conflict of evidence involved, the only issue being one of law. There was, then, no reversible error in refusing to hold the fourth proposition as law.

The New York Life Insurance Co. v. People, 95 Ill. App. 136, was a case on all fours with the present case, except in it the judgment was against both company and agent. In that case, after a careful examination of the authorities cited, we hold that the company, although it did not know of the action of its agent, and did not ratify or affirm such action, was nevertheless liable, if its agent was guilty of violating the provisions of this statute. The judgment of this court was affirmed by the Supreme Court in 195 Ill. 430, upon a ruling on the admission of evidence, but construction of the statute was not discussed, the Supreme Court saying:

"The principal contention of appellant is, that it appears from the evidence that the rebates, if any, were made by its agent without the knowledge or consent, and against its express directions, and that it is not liable for a penal

offense so committed by another. The question, as one of law, does not arise upon this record. * * * As the trial court was not asked to hold any propositions as law in the decision of the case, no question of law involving the construction of the statute is presented to us for decision."

By the refusal of the court, in the case at bar, to hold as law the propositions submitted by appellant, the construction of the statute is now directly presented for consideration. It involves this question, namely: Is a corporation in this state liable for a penalty when its agent, without its knowledge or ratification, and against its instructions, violates a law, for which violation the statute in explicit terms imposes a penalty, jointly and severally, upon both agent and principal?

In the opinion of this court, this is no longer an open question in this state, the highest tribunal of the state having repeatedly affirmed judgments against corporations for unlawful acts of their agents, although committed against positive instructions, and without the knowledge or affirmance of their principals.

We see no reason, then, for a different holding in the case at bar from that in *New York Life Insurance Co. v. People, supra*. The statute is broad in its terms, requiring no *scienter* on the part of the corporations.

The right of appellant to incorporate and to transact business in the state, was conferred by the state. When appellee accepted its charter from the state, it was with an implied obligation that it would conform to and obey the laws of the state, or suffer the consequences.

Corporations are intangible creations. They can not be touched by physical punishment. They act only through their living representatives. What these representatives do in the transaction of the business of the corporation the corporation, in law, is held to have done. When agents violate a statute directing, or prohibiting, a manner of conducting the corporate business, the corporation violates the statute. If this were not so, the corporation itself would never be amenable to penalties for violations of law. The

intangible corporation can not shield itself behind tangible agents whom its directors have chosen to represent it, and who may be financially irresponsible. To allow this would practically defeat the enforcement of law. Corporations other than insurance companies have frequently been held liable to penalties for the violation of statutes by their agents, although committed without their knowledge and against positive instructions. Why not insurance companies?

Toledo, Wabash & Western R. R. Co. v. The People, etc., 81 Ill. 141, affirms the liability of a railroad company to pay a penalty for the stopping of a train by its conductor or engineer upon a public crossing.

To the same effect is Indianapolis & St. Louis R. Co. v. The People, etc., 91 Ill. 452. It was an action to recover a penalty imposed by statute, for neglecting to stop a train before crossing another railroad track on the same level. In this case it is held that a direction to a conductor, or an engineer, to stop his train before crossing tracks, is no defense to an action against the corporation, where the statute has been violated by engineer or conductor. In this opinion the court say :

"The General Assembly, in adopting this police regulation, must have known that the officers having control of the corporation would not operate it, but would do so by employes; and that body must have intended to and did require these companies to employ men who would obey orders, or be responsible for their neglect or refusal. These companies know the legal requirements, and must, by such rules as may be necessary, compel their employes to observe the law, or respond to the penalty imposed by the statute."

If it be said that this law was in the nature of a police requirement, the reply is, that the authority of the legislature to pass the statute under which the prosecution in the case at bar is made, is not questioned, and we take it that it can not be successfully questioned. It was the violation of the law in the case last cited, that the court considered in its judgment, and not the reason for the passage of the law. The fact that the reason for the passage of one law may be different from the reason for the passage of another

law, does not affect the enforcement of either law. The duty of the courts to enforce laws does not depend upon the causes which led to their enactment, but does depend upon their terms clearly and definitely expressed.

It is just as true of an insurance company as of a railroad company, that "these corporations must compel their employes to observe the laws or respond to the penalties imposed by the statute." Courts can not discriminate in the enforcement of laws, holding that one class of corporations is liable for tortious acts of agents and another class is not liable.

In *L. S. & M. S. R. R. Co. v. Brown*, 123 Ill. 162, it is said, among other things, quoting from *Pierce on Railroads*, page 277-8:

"The company is liable for the acts of its servants in the course of their employment, both in the rightful use and in the abuse of the powers conferred upon them; and when they keep within the course of their employment, it is responsible for their negligence or wrongful act, although they are acting against its instructions, or even willfully." Citing numerous cases.

That the master is liable even for willful acts of his servant when done in the course of his business, whatever may have been the common law, is well established in this state by many decisions.

In *C., St. P. & Fond du Lac R. R. Co. v. McCarthy*, 20 Ill. 388, it was held that a railroad company is responsible for the tortious acts of its contractors while in the line of its employment.

To the same effect are *Rockford, R. I. & St. L. R. R. Co. v. Wells*, 66 Ill. 321; *Hicks v. Silliman*, 93 Ill. 255; *Western Union Telegraph Co. v. Satterfield*, 34 Ill. App. 386. Very many cases holding the same doctrine might be cited from our Supreme Court decisions.

Chicago City Ry. Co. v. McMahon, 103 Ill. 485, is a case where a clerk was employed to look after witnesses in damage suits against the company and to see that cases were ready for trial. Upon trial of a case against the company, plaintiff's attorney sought to prove that this clerk

had offered to bribe witnesses to swear for the company. It was objected to on the ground that the company was not liable for a wrongful act of its agent done without its authority. The objection was overruled.

The Supreme Court, in passing upon the relation of a corporation to its agents, discusses it at some length. In this opinion, among other things, it is said :

“ Was the act, although unauthorized, and unsanctioned by the company, so far within the scope of his employment as to render his acts the same as those of the company ? * * * A corporate body being an intangible and mere imaginary body, must, to accomplish the purposes of its creation, employ or act through natural or physical instrumentalities. It must act through natural persons, and such natural persons perform the acts the corporation, by its charter, is authorized to perform. The agents of the corporation act for it, and it is by such agencies that it can exercise or perform any function, or incur any liability. * * *

It is a general rule, without exception, that when a servant exercises his power or performs his duty in so careless or negligent a manner that wrong ensues to another, the master is liable in damages. * * * In this state, the rule has a more comprehensive definition and a broader application. It has been repeatedly held, that when acting in the scope of his duty, acts of the servant not merely careless or negligent, but willful and malicious acts, are embraced. * * * Nor is the rule a new one in this jurisdiction, as it has obtained for a quarter of a century or more. * * * If *Green v. The Town of Woodbury*, 48 Vt. 5, announces a different rule, it is opposed to the long and well established doctrines of this court; nor do we incline to change the rule of this jurisdiction merely for the sake of conformity.”

We apply this last declaration of the Supreme Court to decisions cited by appellant from other states as applicable to the case at bar, some of which do not appear to be in harmony with the decisions in this state.

It is said in *Singer Manufacturing Co. v. Holdfodt*, 86 Ill. 455, that since the decision in *St. Louis, Alton & Chi. R. Co. v. Dalby*, 19 Ill. 353, it has been regarded as settled law that :

"If the wrongful act of the agent is perpetrated while ostensibly discharging duties within the scope of the corporate purposes, the corporation may be liable to vindictive damages."

This asserts the doctrine that a corporation may be punished for the acts of its agents.

In *Noecker v. People*, 91 Ill. 494, it is expressly held that a fine may be recovered under a penal statute against a saloonkeeper for the violation of a statute by his bartender, although the act committed was against instructions. In this case the court say:

"When a defendant keeps intoxicating liquors for sale, he will be held responsible for sales thereof by his clerk, no matter what may have been his instructions to him not to sell."

To the same effect is *State of North Carolina v. Kittelle*, Lawyer's Reports Annotated, Vol. 15, p. 694; *Riley v. State*, 43 Miss. 397.

In a note on page 663 L. R. A., Vol. 41, commenting upon *Bryan v. Adler*, 97 Wis. 124, it is said:

"But a principal is criminally liable for a sale of intoxicating liquors by an agent under a statute forbidding a person from selling by himself, clerk, servant or agent, the proprietor being liable thereunder by whomsoever liquor was sold." Citing authorities.

The test as to the liability of the principal for the unlawful act of his agent in such cases, being, as appears from the above citation, that the statute forbids sales by principal, agent or servant.

Applying this test to the case at bar, we find that the statute cited *supra*, provides that "if any life insurance company, or association, its agent or agents as aforesaid, shall make any unjust discriminations," etc.

This language brings the case under the rule as stated in the citation above made, the statute under consideration not only making both corporation and agent liable, but declaring that "the insurance company shall, together with the agent so unlawfully transacting said business, jointly and severally, be liable," etc.

If vindictive damages can be recovered against principals for willful, tortious acts of agents done within the scope of their employment, and without the knowledge of their principals; or fines collected from employers for a violation of law by an employe against the prohibition of his employer; or penalties enforced against railroad companies for the neglect of their servants to obey police regulations, which they have been ordered by their masters to obey, we fail to see why insurance corporations should escape when their agents violate statutes which in express terms apply to both companies and agents.

Without referring specifically to the points made by appellant, some of which seem to be sustained by decisions in other states, it is sufficient to say that they do not represent the law as held by the highest tribunal in this state.

We said in *New York Life Insurance Co. v. The People*, 95 Ill. App. 142, in commenting upon *Satterfield v. Western Union Tel. Co.*, 23 Ill. App. 446, cited by appellant in that case, and again cited in the present case, "It is a case under the statute providing a penalty for cutting timber. It is held by the Supreme Court that such cutting must be willful in order to recover the penalty provided." The statute against cutting timber, does not, like the statute under consideration at bar, make the corporation jointly and severally liable with the agent for his unlawful acts. The distinction is, that the statute under which this action is brought does make both the corporation and its agent jointly and severally liable for the penalty when the statute is violated by the agent.

In *Cushing v. Dill*, 2 Scammon, 460, similarly cited, the Supreme Court say: "The statute gives the penalty against the actual trespasser only. It would be a violation of legal principles, therefore, to extend so as to embrace another by implication."

In the case at bar the penalty against the insurance company is not extended by implication, but is extended by express terms.

Seeing no error in the record, the judgment of the Circuit Court is affirmed.

**The Franklin Life Insurance Co. v. The People ex rel.
Moses Atwood.**

108 565
Case 1
a200s 594

WILLIAM W. CLEMENS, attorney for appellant.

L. D. HARTWELL, State's Attorney, and PILLOW & SMITH,
attorneys for appellee; ED. M. SPILLER, of counsel.

MR. JUSTICE WORTHINGTON delivered the opinion of the court.

This case is on all fours with *The Franklin Life Insurance Co. v. The People ex rel. James Yancey, supra*. By agreement it was tried with the latter case, and the same propositions of law were submitted, and were refused by the court. The decision of this case is therefore controlled by the decision in that case, to which decision reference is hereby made. Judgment of the Circuit Court affirmed.

Indiana, Decatur and Western Ry. Co. v. Solomon Fowler.

108 565
Case 2
a201s 152

1. **FRAUD**—*In Obtaining Release of Claim for Personal Injuries.*—When a sum of money is received as payment for time lost on account of an injury, or for damages to property, and the receipt for this is fraudulently made, as a release to cover damages for all personal injuries, the money so received may be retained, and its retention is no bar to a suit for personal injuries.

2. **SAME**—*Cognizable in Court of Law.*—Fraud in the execution of an instrument has always been admitted in a court of law, as where the instrument has been misread, or some other fraud or imposition has been practiced upon the party in procuring his signature.

3. **RELEASE**—*Of Claim for Personal Injuries—Fraud.*—In settlements of claims for personal injuries fairness must be used, and any willful misrepresentation of facts by the party procuring a release constitutes fraud.

Trespass on the Case. for personal injuries. Appeal from the Circuit Court of Jasper County; the Hon. SAMUEL L. DWIGHT, Judge presiding. Heard in this court at the August term, 1902. Affirmed. Opinion filed September 11, 1902.

GEORGE W. FITHIAN, attorney for appellant; R. D. MARSHALL, of counsel.

I. D. SHAMHART, attorney for appellee.

MR. JUSTICE WORTHINGTON delivered the opinion of the court.

Appellee, having been injured in a wreck while a passenger on appellant's train, caused by the breaking of a bridge, brought suit and received a judgment of \$1,000 for personal injuries, from which judgment appellant appealed.

Nine days after receiving the injuries, and while appellee was suffering on account of them, and was still in bed, Graves, superintendent of appellant's road, Roberts, appellant's attorney, and one Dr. Berns, called at appellee's house, and upon the payment of \$35 to appellee, procured from him a release, in the following form :

"Accounts payable Indiana, Decatur & Western Railway Co.

"To Solomon Fowler, Dr.....\$35.00

"On account of and in full compromise and settlement of all damages, or claims therefor, on account of personal injury to him whilst a passenger on one of the trains of the Indiana, Decatur & Western Railway Company, near Ste. Marie, July 16, 1900, when a train jumped the track and went through a trestle, resulting in injury to him; this settlement to be in full for all damages or claim or claims therefor arising out of said accident and injury, in any way or manner, to the said Solomon Fowler, and all claims for damages, physician bills and all other claims whatsoever. This to be in full release for any and all damages and all such injuries, claims or damages.

"Approved: GEO. H. GRAVES,

"General Superintendent.

"Correct: R. D. MARSHALL,

"General Solicitor.

"Received July 25, 1900, of the Indiana, Decatur & Western Railway Company, thirty-five dollars, in full of the above account. \$35.00.

His

"SOLOMON X FAULLER
mark.

"P. C. BERNS, Witness."

The case turns upon the validity of the release. If valid, appellee can not recover. Counsel for appellant, at the trial, as shown by his abstract, said :

"We stand on our receipt in this case; that is our defense. * * * We rely on our settlement and receipt in full satisfaction of any claim he might have for any damages. The defendant admits everything in the declaration except as to the extent of his injuries. Let him show—let him prove that."

As it was not urged in a motion for new trial, nor is it assigned for error that the damages are excessive, the amount of the judgment is not in question. The release, appellee insists, was procured by fraud intentionally perpetrated by the agents of appellant. Appellant denies this, and avers that it was knowingly and voluntarily signed by appellee, and that it is a bar to any recovery in this action. The pleadings present this direct issue. Appellant also insists, as a matter of law, that in any event appellee must have returned the \$35 which he received when the release was signed before he could commence his suit.

That a release obtained by fraud, knowingly perpetrated, is absolutely void, is well established, both upon principle and authority.

If a release is voluntarily given, the party knowing that it is a release, although his signature may have been procured by false representations, the law is that the money received must be returned before suit is brought. In such case it is a contract induced by false representation. It is voidable, but not void. But if the party executing the release was induced by fraud to sign it, not knowing that it was a full release of all claims, but believing it to be a receipt only for money paid for a specific purpose under circumstances that excused him from reading or ascertaining its contents, he is not bound to return the money received before bringing suit. In such case it is not a contract of release of all claims, being absolutely void as such release on account of the fraud in its procurement.

In C., R. I. & P. Ry. Co. v. Lewis, 109 Ill. 129, in a case analogous to the case at bar, it is said :

"If the release was obtained from plaintiff by representations or acts of defendant's agents which induced in her mind the belief it was only a receipt for money paid her at the time, as compensation to her for loss of time and expenses incident to the delay that had resulted from the accident, and not as a discharge of defendant from any claim she might have against the company for injuries sustained, or if it was obtained by fraud and circumvention on the part of the agents of defendant, the writing would be void as to her. * * * If she was induced to sign it under the belief created by defendant's agents that she was simply signing a receipt for expenses, defendant would not be permitted to plead it as a defense to the action. That would be to have an advantage from its own wrong, which the law will not tolerate." * * *

And again:

"On principle, an instrument absolutely void needs not to be rescinded to remove it out of the way of the assertion of a right. It is for the obvious reason it never had any binding force, and there was therefore nothing to rescind. A contract void on account of fraud or for other reason, is in law, as though it had never been executed."

To the same effect are *Mullen v. Old Colony R. R.*, 127 Mass. 86; *Beach on Modern Law of Contracts*, sections 496-497.

In *Hartshorn v. Day*, 19 Howard, 211, it is said:

"Fraud in the execution of an instrument has always been admitted in a court of law, as where it has been misread, or some other fraud or imposition has been practiced upon the party in procuring his signature."

Where one sustains personal injuries and at the same time damages to his personal property, and a release for a money consideration is given covering damages for both, if it is shown that the release for injuries to the person was fraudulently incorporated in the release, which was to be for damages to property only, he may recover for damages to his person without returning money received for damages to property. *Och v. M. K. & T. R. Co.*, 130 Mo. 27; *Bliss v. N. Y. C. & H. R. R. Co.*, 160 Mass. 447; *Lusted v. C. & N. W. R. R.*, 71 Wis. 391.

Gibson v. W., N. Y. & P. R. R. Co., 164 Pa. St. 142, and

I., D. & W. Ry. Co. v. Fowler.

Pawnee Coal Co. v. Royce, 184 Ill. 411, cited by appellant, both recognize the right to bring suit without returning the money received where a positive fraud has been practiced in securing the release. In the Gibson case, *supra*, it is said :

“ When there is a disaffirmance of the contract because of fraud, the injured party may, in some cases, bring his action without repaying the money received on the fraudulent contract. In such case the money is retained, not as a part of the consideration of a contract he denies, but as a part indemnity for the fraud perpetrated upon him.”

And in the Royce case, *supra*, it is said :

“ If, however, a release is procured by the perpetration of an active or positive fraud upon the plaintiff by the defendant or its officers, there may be circumstances under which the plaintiff will not be required to return, or offer to return the consideration received for the pretended release, but he may bring his suit without doing so.”

From an examination of these and other authorities we think it clear that when a sum of money is received as payment for time lost on account of an injury, or for damages to property, and the receipt for this is fraudulently made as a release to cover damages for all personal injuries, that the money so received may be retained, and its retention is no bar to a suit for personal injuries.

Was the release in the present case thus fraudulently obtained? This was a question of fact for the jurors to answer. In finding for appellee and in answering the special interrogatory asked by appellant, they have said that the release was procured by fraud and circumvention. If the evidence considered as a whole fairly tends to support such finding it should not be set aside.

In passing upon this issue, the circumstances of the case must be taken into consideration. At the time the release was obtained, nine days after the accident, appellee was in bed, confined there by his injuries and suffering “ terrible ” as he testifies, and unable to stand alone without assistance. He could neither read nor write, and had no one present as a friend or adviser except his wife, who could barely read.

The superintendent of appellant's road, its lawyer, and a doctor came to appellee's house, with the receipt and release already drawn, except as to the insertion of the amount. It is clear that the parties did not stand upon an equal footing to start with. A railroad superintendent, a skilled attorney, and a doctor pitted against a man who could neither read nor write, suffering in bed from his injuries, with no one to advise or inform him what was being done except his wife, of whom he testifies, "Well, sir, she couldn't read it at all; she can't read writing to do any good," describes a condition of affairs in which the parties contracting were not on equal terms.

Appellee testifies:

"I remember them, Roberts, Graves and Dr. Berns coming to see me. They said they come to see how I was getting along, and asked me what I thought I ought to have. He said he didn't come to set no price. They wasn't there to set no price.

Q. What, if anything, did he say he wanted to pay you for? A. For loss of time.

Q. Occasioned by what? A. By getting in that wreck.

Q. Do you remember what computation was made or how many days they were paying you for? A. They said they would allow me \$1.50 for twenty days.

Q. Go ahead and state how they finally sprung it to you. A. They said they would make me a present of \$5. I don't know which one said it, or who suggested it; they were out in the kitchen.

Q. What, if any, paper did you sign that day? A. I don't know what paper it was, or what paper they had. They came out and took the paper out of their pocket and said, 'Will you sign this paper?' I don't know which one said it. I said I didn't care. I didn't sign it myself, he wrote my name. I can not read nor write. My wife can read and write a little bit, not enough writing to make out much.

Q. Have you heard this instrument read? A. No, sir.

Q. Did you hear it read a while ago? A. I heard Mr. Fuhean read it to the jury.

My wife can't read writing to do any good.

* * * * *

Q. What was said that day about paying you for any

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personal injuries you received? A. There was nothing said that I heard about any injuries.

* * * * *

I was lying in bed, sitting up in bed with my hands on the bed holding my weight off of my back on my arms, my feet hanging over the bed. I tried to stand up, Mr. Berns wanted me to try to stand up, and the hurt on my ankle and the bruises hurt me so that I couldn't stand to do any good. Mr. Berns helped me to stand. I was bobbling like I would fall and Berns, he caught me and I sat down again."

Cross-examination :

"Q. You say this instrument wasn't read over to you? A. It wasn't read to me.

Q. It wasn't explained to you, you say? A. No, sir.

Q. Did you sign it or authorize them to sign your name without knowing what it was? A. I told them I didn't care; they asked me two or three times about signing my name and I told them I didn't care.

Q. It didn't make any difference to you what the receipt was, did it? A. I don't know. I told them I didn't care if they signed my name.

Q. You didn't care what you signed—is that what you mean? A. I didn't know what I was signing, nor they didn't tell me what I was signing."

Re-direct :

"Q. What was your condition that day as regards pain and suffering? A. I was hurting terrible."

The testimony of appellant's witnesses, in some respects, tends to corroborate appellee's testimony in this, that the representations made by them were, that appellant was settling and paying appellee for loss of time only. They directly testify, over the objection and exception of plaintiff's attorney, that no fraud, deception, misrepresentation or circumvention was practiced in order to procure the execution of the "receipt."

Geo. W. Graves testifies, in substance, that he was superintendent of appellant's road. That he went in company with Roberts and Berns for the purpose of making a settlement with appellee for his injuries. That Roberts signed the signature of appellee to the receipt, appellee authorizing him to do so.

"Roberts told him we had come to make a settlement with him, and then the conversation was carried on between him and Roberts. Roberts asked him how long he had been idle, and what he was receiving for the work he had done. I think he also asked Dr. Berns about the probable time of appellee's sickness, or the probable time before he would be able to resume work. Roberts asked him the amount he was receiving a day. I think he said a dollar a day. So they computed the time, and I have forgotten just what it amounted to, but it was less than \$30. Roberts asked if that was satisfactory and he said he thought he ought to have more, and remarked he ought to have \$30, and finally in the windup of the thing, I said to Roberts to give him \$35, and he said that was satisfactory. Roberts read the receipt over to him and explained what we came for."

"Q. State whether he explained the effect or purport of the receipt to Fowler?"

Question objected to; objection overruled and exception taken by plaintiff.

A. Why, yes, sir, he explained what the receipt was for."

Cross-examination:

"Roberts told him who I was and explained what we came for, to make a settlement for his injuries. I couldn't tell all the conversation. It was during it that Berns was asked for his estimate of the time Fowler would be unable to work. I remember the rate per day as a dollar, and the amount as \$26, something less than \$30, but am not positive as to the amount. They compromised on \$30. That was a little more than it figured. There was no suggestion that it be raised to \$35. I simply told Roberts to make it \$35. I think I said I wanted him to be perfectly satisfied, and in case there would be a few days more, why make it enough; so in order that he should have enough I told him to make it \$35."

This answer, taken *verbatim* from the record, indicates that the witness, Graves, superintendent of appellant's road, at the time thought that he was settling for the number of days appellee had lost, and might lose on account of his injuries. If not, why did he say, make it \$35, in order that it might be enough in case there were a few days over?

"Q. The only explanation that Roberts made of the release, I believe you said, was made when he came into the room and was explaining his business? A. Yes; he

said who we were when we went in, and I think Dr. Berns introduced us, telling who we were."

Dr. Berns, for appellant, testified in substance, that the company paid his bill for attending Fowler and that he paid for the conveyance to take Graves and Roberts out to see Fowler; that Roberts told appellee that they were there to pay him for his time and injuries; that Roberts asked him what he was getting a day, and was told a dollar a day; that he computed the time and that it amounted to about \$25. So they asked him if he was satisfied, and he said he ought to have \$30, or something to that effect, and Graves said to give him \$35. They wrote the receipt for \$35.

This evidence of Berns tends, we think, to show that the only amount then agreed upon was for loss of time.

It will be noticed that neither of these witnesses states definitely the number of days claimed by appellee. As it was only nine days after the injury the number must have been estimated. Appellee swears that twenty days was the number, and \$1.50 per day the sum agreed upon. This would make even \$30, and corresponds with the statement of Graves, that \$5 was given over and in excess of the amount computed. Graves not having the money with him, Berns loaned it to him, and it was paid to Fowler's wife. Roberts wrote Fowler's name on the receipt at Fowler's direction.

This witness also testified, over the objection and exception of plaintiff, that there was no fraud or deceit, etc., practiced in obtaining the release.

The objection to questions calling for such answers should have been sustained. They called for conclusions of the witnesses upon a mixed question of fact and law. The examination should have been confined to what was said and done, and the jury left to draw conclusions under instructions from the court as to what constituted fraud.

The witness Berns was asked in cross-examination:

Q. You say the computation was made in figuring out his damages represented by Ex. A (the release); did they ask you for the probable length of time he would be incapacitated from work? A. Yes, sir; something.

Q. Was that computation based on your estimate? A. I do not know what it was based upon.

Q. You say they figured out the amount at something less than \$30? A. Yes, sir.

Q. By paying him at a certain rate per day? A. Yes, sir.

Q. He expressed dissatisfaction with that amount and thought he ought to have more than \$30? A. Nobody expressed dissatisfaction particularly. He was asked whether that would be sufficient, and after that he said he thought he ought to have more; they asked him what he thought he ought to have and he said he thought he ought to have \$30.

Q. Who was it sprung it to \$35? A. Mr. Graves.

Appellant's attorney, Roberts, testified, in substance:

"We told him (appellee) that we came to see if we could settle with him for the injuries he had received. We asked him what his business was, and what he made a day. He told me, I believe, \$1 a day. He told me how long he had been in bed. I asked how much he wanted to settle. I figured with him as to the amount he could earn in that time and allowed him two weeks or ten days longer. I offered him \$25 and he said he ought to have \$30. Finally the superintendent said to give him \$35, and he was satisfied. I told him I had prepared a receipt in full settlement and discharge of his injuries and would like to have him sign it, and took it out of my pocket, and read it to him and explained what it was for and that by it he released the company from all liability."

In cross-examination the witness stated that he did not remember whether at a former trial he had stated that the receipt was read to him or explained to him.

"I figured with him and paid him more than he could have earned, and paid him for his suffering. I don't remember the number of days, whether twenty or not. The receipt, except as to the amount, was prepared before we went there."

It will be observed that Berns does not testify that the release was read or explained to appellee. Appellee testifies that it was not read to him, nor was he told what it was. It will be observed also that both Graves and Roberts use the word "receipt" instead of release, when they say it was read to appellee.

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The receipt taken by itself reads :

"Received July 25, 1900, of the Indiana, Decatur and Western Railway Company, thirty-five dollars, in full of the above account (\$35).

his
SOLOMON X FAULLER.
mark.

F. C. BERNs, Witness."

The word "receipt" may have been used by these witnesses inadvertently instead of the word "release," or it may be from their testimony that the "receipt" alone was read, and the body of the paper not read.

Considering this evidence as a whole, and noting the positive testimony of appellant that "he said he wanted to pay me for loss of time, and that they would allow me for twenty days at \$1.50 a day, making \$30, and would make me a present of \$5," and his positive testimony that the release was not read to him, nor was he told what it was, and considering the relative situation of the parties, it is not strange that the jurors concluded that the release was procured to be signed by the agents of appellant, by knowingly inducing appellee, who was unable to read or write, to believe that he was being paid only for loss of time, and was receipting for money so paid. If this was true the release was fraudulently obtained. Upon a careful review of the evidence we can not say that it was insufficient to warrant the jury in so finding.

It will be noted that this is not a case between appellee and a third party. It is a case directly between the parties to the transaction.

The cases of C., R. I. & P. R. R. v. Lewis, cited *supra*, Pioneer Cooperage Co. v. Romanowicz, 85 Ill. App. 407, Eagle Packet Co. v. DeFries, 94 Ill. 598, and I. C. R. R. Co. v. Welch, 52 Ill. 183, go far in asserting the doctrine that in settlements of this character, fairness must be used, and that any willful misrepresentation of facts by the party procuring a release constitutes fraud. In the latter case it is said in reference to a receipt for one month's wages, and containing the words "in full of all claims, demands and damages," etc., "forever releasing said company," etc. :

"If, however, the appellee was induced to sign it by representations that it covered merely his claim for a month's time, or a month's wages, or if he signed it under such a belief, induced by the words or acts of the appellant, then, of course, the release would not be a bar to the prosecution of this suit. This question should have been left to a jury."

The question in the case at bar was left to the jury and the court did not err in refusing the peremptory instruction asked by appellant.

We do not deem it necessary to discuss at length instructions 2, 3 and 5, criticised by appellant, nor the tenth instruction asked by him, which was refused.

It may be said in general in reference to them, that appellant, by his instructions, presented the issue of fraud to the jury as the controlling issue, and by his special interrogatory received a definite answer upon this issue.

The interrogatory was as follows:

"Was the receipt offered in evidence by the defendant obtained by the defendant from the plaintiff by fraud and circumvention?"

To this special interrogatory the jury answered "Yes."

This leaves no doubt as to the finding of the jury upon an issue material to the case and sufficient to support their verdict if the evidence was sufficient to support their finding.

Seeing no material error in the record the judgment is affirmed.

D. W. Harvey et al., for the use of, etc., v. Herman Cochran et al.

1. JUDGMENTS—*What Are Not.*—The following appeared of record: "The parties to this suit, by their respective attorneys, being in court, and the plaintiff electing to stand by first count in the declaration, and refusing to amend, it is therefore ordered by the court that this cause be dismissed for want of prosecution, at cost of plaintiff, and that execution issue therefor." *Held*, that it is not a judgment at all, much less a final judgment from which an appeal or writ of error can be taken.

Assumpsit.—Error to the Circuit Court of White County; the Hon. ENOCH E. NEWLIN, Judge presiding. Heard in this court at the August term, 1902. Dismissed. Opinion filed September 11, 1902.

Harvey v. Cochran.

B. S. ORGAN and C. S. CONGER, attorneys for plaintiffs in error.

ROSS GRAHAM, attorney for defendants in error.

MR. JUSTICE WORTHINGTON delivered the opinion of the court.

David W. Harvey, owning a life estate in eighty acres of land, and W. S. Harvey, owning the remainder in fee, joined in a mortgage for \$900, to John Holderby, for money borrowed for the use of said W. S. Harvey. Subsequently plaintiffs in error rented said land at \$200 a year, for five years, by written lease, dated March 9, 1898, to defendants in error. Upon the back of the lease are these two indorsements:

“Received, Carmi, Ill., April 2d, 1898, of Wm. R. Cochran, the sum of one hundred and seventy dollars, in full payment of two hundred dollars rent due on this lease. Aug. 1st, 1899.

Witness our hands and seals this day above written.

D. W. HARVEY, (SEAL)

W. S. HARVEY. (SEAL)”

“It is now agreed and distinctly understood, by and between the undersigned, that the balance of rent under this lease shall be paid to John Holderby, to be applied on mortgage held by him on the said land herein described as said rent falls due.

Witness our hands and seals this 2d day of April, 1898.

D. W. HARVEY, (SEAL)

W. S. HARVEY. (SEAL)”

On November 23, 1898, W. S. Harvey, owning the remainder in fee after the life estate of his father, D. W. Harvey, was extinguished, sold and conveyed his interest in said land to Wm. R. Cochran, the father of defendants in error, he, the vendee, assuming the payment of the Holderby mortgage as part of the purchase price.

This action is to collect the second year's rent, due August 1, 1900.

The declaration consists of one count upon the lease, attaching a copy with the indorsements above recited and

making it a part of the declaration, and of the common counts.

A demurrer to the first count was sustained and plaintiffs elected to stand by the first count.

The record fails to show any disposition of the second count, which consists of the common counts. Neither is there any record of a final judgment from which an appeal could be taken.

The record is as follows :

"The parties to this suit, by their respective attorneys, being in court, and the plaintiff electing to stand by first count in the declaration, and refuses to amend, it is therefore ordered by the court that this cause be dismissed for want of prosecution, at cost of plaintiff, and that execution issue therefor."

This is not a judgment at all, much less a final judgment from which an appeal or writ of error can be taken. The right of review by appeal or writ of error is given and controlled by the statute.

Sec. 67 of the Practice Act provides that "appeals from and writs of error to all Circuit Courts * * * may be taken to the Appellate Courts from all final judgments, orders and decrees," etc., and that "authentic copies of records of judgments, orders and decrees appealed from shall be filed in the office of the clerk of the Supreme Court or of the Appellate Courts," etc.

The record in this case shows simply an order dismissing the case for want of prosecution. We must accept this as a statement of fact. This is not the record of a final judgment. It was no bar to another suit for the same cause of action. It lacks essential features of a valid judgment. It is at most but a recital by the clerk that the court ordered the suit to be dismissed for want of prosecution, at cost of plaintiff, and that execution issue therefor.

There is no error assigned for dismissal for want of prosecution. The errors assigned are for sustaining the demurrer and for rendering judgment for costs against plaintiff.

As there is no judgment against plaintiff, even for costs,

Moore v. Ortgier.

there was no judgment rendered for rendering which an exception could be taken.

That the record does not show a judgment is manifest from the authorities cited below and from many others that might be cited. *Metzger v. Morley*, 83 Ill. App. 113, affirmed in 184 Ill. 81; *Fitzsimmons v. Munch*, 74 Ill. App. 259; 1 Black on Judgments, Sec. 3; *Birdsell Manufacturing Co. v. Independent Sprinkler Co.*, 87 Ill. App. 443; *Faulk v. Kellums*, 54 Ill. 188; *Martin v. Barnhardt*, 39 Ill. 9.

The record showing no judgment for this court to review, the writ of error is dismissed.

J. W. Moore et al. v. William Ortgier.

1. APPELLATE COURT PRACTICE—*Where a Judgment Will Not be Reversed for Slight Errors.*—Where the whole record is considered together, and it is apparent that substantial justice has been done, this court will not reverse the judgment for slight errors in the record.

Assumpsit.—Appeal from the City Court of East St. Louis; the Hon. PAUL MCWILLIAMS, Judge presiding. Heard in this court at the August term, 1902. Affirmed. Opinion filed September 11, 1902.

J. W. BLYTHE and J. W. BARTHOLEMEW, attorneys for appellants.

ALEXANDER FLANNIGEN and B. H. CANBY, attorneys for appellee.

MR. JUSTICE CREIGHTON delivered the opinion of the court.

This was a suit commenced by appellee against appellants, before a justice of the peace, in St. Clair county. By agreement of parties a change of venue was taken to the City Court of East St. Louis, where the case was tried by a jury, resulting in a verdict in favor of appellee for \$129.23.

Appellee's demand consisted of a number of items. To this demand appellants presented a set-off, also consisting of a number of items. The parties had been dealing with

each other for some years and each held valid accounts against the other. The controlling questions in the case are questions of fact and were submitted to a jury for determination. The evidence clearly shows that after allowing all just credits, deductions and set-offs, appellants were indebted to appellee, and we are of opinion it fully warrants the finding returned by the jury.

While the record is not free from error in some of the respects complained of, yet, when the whole record is considered together, it is apparent to the court that substantial justice has been done. In such case an Appellate Court will not reverse for slight errors. The judgment of the City Court of East St. Louis is affirmed.

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The Northwestern National Life Ins. Co. v. Alta Irwin et al.

1. **INSURANCE**—*Application a Part of the Contract.*—Where an applicant for insurance signs two papers for the purpose of procuring a policy of insurance, and thereupon the policy is executed and delivered to him, the three papers, all considered and construed together, constitute the contract.

2. **WORDS AND PHRASES**—*Mining Defined.*—Mining is defined to be, "The act or business of making mines or of working them." Webster's International Dictionary.

Assumpsit, upon contract of insurance. Appeal from the Circuit Court of Saline County; the Hon. ALONZO K. VICKERS, Judge presiding. Heard in this court at the August term, 1902. Reversed. Opinion filed September 11, 1902.

BROWN & KERR and W. F. SCOTT, attorneys for appellant.

LEWIS & SOMERS, attorneys for appellees.

MR. JUSTICE CREIGHTON delivered the opinion of the court.

This was an action of assumpsit in the Circuit Court of Saline County, by appellees against appellant, to recover upon an insurance contract. The beneficiaries are all infants

Northwestern National Life Ins. Co. v. Irwin.

and bring the suit by their legal guardian. A jury was waived. Trial by the court by agreement. Findings and judgment in favor of appellees for \$1,039.50.

The case was submitted to the court for trial upon an agreed statement of facts as follows :

“ AGREED STATEMENT OF FACTS.

STATE OF ILLINOIS, }
County of Saline, } ss.

In the Circuit Court, at the April Term, A. D. 1902.

ALTA IRWIN ET AL.	}	Assumpsit.
vs.		
N. W. NAT. LIFE INS. CO.		

It is hereby stipulated and agreed by and between the parties to this suit that on the 6th day of May, 1901, Joseph A. Irwin, by the name and abbreviation of J. A. Irwin, made application to the defendant, Northwestern National Life Insurance Company of Minneapolis, Minnesota, and contemporaneously signed, executed and delivered to T. W. Grisham, then soliciting agent of the defendant, the two papers hereto annexed marked 'Exhibit A' and 'Exhibit B' to be by said agent forwarded to the defendant company for the purpose of procuring a policy of insurance from said company, and that on the 7th day of May, 1901, the said Joseph A. Irwin appeared before Dr. J. R. Baker, of Harrisburg, Illinois, who was then the examining physician of the defendant, and was then and there examined by the said J. R. Baker as appears by the second part of 'Exhibit A,' and on the said 7th day of May, 1901, the said papers marked 'Exhibit A' and 'Exhibit B' were delivered to the said T. W. Grisham, agent as aforesaid, to be by him forwarded to the defendant company, and on the day last aforesaid said papers marked 'Exhibit A' and 'Exhibit B' were by regular course of mail forwarded to the defendant company at Minneapolis, Minnesota, together with the letter hereto annexed marked 'Exhibit C,' and that said 'Exhibit A,' 'Exhibit B' and 'Exhibit C' were received by the defendant at Minneapolis aforesaid in due course of mail, and on the 10th day of May, 1901, the defendant company issued and mailed to the said T. W. Grisham, agent as aforesaid, the paper hereto annexed marked 'Exhibit D' to be by said agent delivered to the said Joseph A. Irwin, and the same was so delivered within a reasonable time after its receipt by said agent, and the first annual premium paid as shown by receipt marked 'Exhibit E.'

And it is further stipulated and agreed that on the 29th day of June, 1901, said policy being in force, the said Joseph A. Irwin was killed in the following manner, that is to say: on or about the 12th day of May, 1901, he was employed with a crew of hands to assist in sinking a coal shaft for the purpose of opening a coal mine for the Saline County Coal Company, for which services he received as wages twenty-five cents per hour, and he continued in said employment until the time of his death: that said shaft was sunk through dirt about fifty feet from the surface down, and this part of the shaft, which was about nineteen by eight feet, was cased up with timber to prevent the dirt from falling in, and to prevent this casing from falling in or being pushed in by the exterior pressure of the dirt, there were braces or pieces of timber about eight feet long and fastened at the ends to the casing, which braces were far enough apart to allow the rock car to pass up between them when properly managed; and that below this fifty feet of dirt and casing, the shaft was sunk through solid rock; and that on the 29th day of June, 1901, the said Joseph A. Irwin and others who were then and there working with him in said shaft, had blasted up a lot of rock and loaded them into what was called a rock car, and said loaded car was being raised to the surface by a hoisting engine, when by some means the said rock car struck against one of said braces in said shaft, tore it loose from the casing, and it fell upon the said Joseph A. Irwin and killed him, who was then in the bottom of said shaft, which was about eighty feet deep.

And it is further stipulated and agreed that said coal company continued to sink said shaft until they afterward struck coal at a depth of 130 feet, and now have a regularly equipped coal mine in operation, and raise all the coal mined therefrom through the shaft in which said Joseph A. Irwin was killed, as above stated.

And it is further stipulated and agreed that the plaintiffs are the sole and only children of the said Joseph A. Irwin, who are all minors, and that A. W. Lewis is their regularly appointed and qualified guardian, and that after the death of the said Joseph A. Irwin the said A. W. Lewis, as such guardian, furnished to the defendant company proofs of the death of the said Joseph A. Irwin, and that the same were accepted by the defendant, on August 30, 1901, as satisfactory; and that after said proofs were so furnished, and before the commencement of this suit, to wit, on the 13th

day of November, 1901, the defendant tendered to the said A. W. Lewis, as such guardian, the sum of \$1,000 in gold coin of the United States, in full satisfaction and payment of the amount due under the contract of insurance on which this suit is based, and the same was refused by the said A. W. Lewis, and that on the 17th day of April, 1902, and during this present term of this court, the defendant paid said sum of money in coin, as aforesaid, as a tender into this court, and took a receipt therefor in words and figures following:

'\$1,000.00. HARRISBURG, ILL., April 19, 1902.

Received of the Northwestern National Life Insurance Company of Minneapolis, Minnesota, \$1,000.00 in gold coin of the United States, as a tender of the defendant to the plaintiffs in the case of Alta Irwin et al. vs. The Northwestern National Life Insurance Company; the money being paid into court by W. F. Scott, attorney for the defendant.

ED. M. STRICKLIN,
Clerk of Circuit Court.'

And that on the same day said money was paid into court it was received by the said A. W. Lewis, guardian as aforesaid, and his receipt for the same given to the clerk of this court, in the words and figures following:

'STATE OF ILLINOIS, }
County of Saline. } ss.

In the Circuit Court, of the April term, A. D. 1902.

ALTA IRWIN ET AL.	}	Assumpsit.
vs.		
THE NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY.		

Received of Ed. M. Stricklin, clerk of said court, one thousand dollars (\$1,000.00), the same being the defendant's tender in the above styled cause, this 17th day of April, 1902.

A. W. LEWIS, Guardian of Plaintiffs.

LEWIS & SOMERS, Attorneys for Plaintiffs. W. F. SCOTT, Attorney for Defendant.

Filed April 29, 1902. ED. M. STRICKLIN, Circuit Clerk.'

'Exhibit A.' 7. Occupation of applicant. Give fully. Ans. Coal miner and farmer. Date of application, May 7, 1901. (Signed) Joseph A. Irwin.

'Exhibit B.' Special conditions. For hazardous occupations. Whereas, Joseph A. Irwin, of the county of Saline, State of Illinois, has applied to the Northwestern National Life Insurance Company of Minneapolis, Minn., for a policy of insurance upon his life; and whereas, Joseph A.

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Irwin is engaged in the occupation of coal mining, which said occupation is denominated hazardous by said company, and said company is unwilling to assume full liability under the policy applied for by him for death or disability occasioned wholly or in part by such hazardous occupation; now, therefore, I, the said J. A. Irwin, in consideration of the issuance of a policy of insurance upon my life by the said Northwestern National Life Insurance Company, do hereby agree that in case of my death or disability, occasioned wholly or in part by reason of said hazardous occupation, whereby a claim may arise under said policy, then and in that case said Northwestern National Life Insurance Company shall not in any event be held liable to pay me or my beneficiary more than fifty per cent of the amount named in said policy, and the payment of said fifty per cent by said company shall be a full and complete performance by said company of the requirements and conditions of said policy.

I, ———, the beneficiary named in said policy, do hereby fully ratify and approve the issuance of said policy upon the above and foregoing conditions, which I hereby accept as binding upon me.

Dated at Ledford, Ill., May 6, 1901.

Beneficiary.

Signed in the presence of T. W. Grisham, agent. J. A. Irwin, applicant. Beneficiaries are all small children.

‘Exhibit C.’ THE NORTHWESTERN LIFE ASSOCIATION,
322 & 324 Hennepin Ave.

Dr. J. F. Force, Pres. James Quirk, Treas.
Wallace Campbell, Vice-Pres. C. E. Force, Sec’y.

AGENCY AT HARRISBURG, ILL., 5-7, 1901.
Northwestern National Life Ins. Co., Minneapolis, Minn.

GENTLEMEN: Find enclosed application of Joseph F. Irwin. Mr. Irwin is a miner and farmer, working on the farm in summer and mine in winter. He is a good risk and a very careful man. See special conditions. Send me his policy within ten days, because the A. O. U. W. is wanting him to insure in that order.

Yours truly,

T. W. GRISHAM.

P. S. Find enclosed draft for \$30.41, balance on last month's business. Please send receipt.

T. W. GRISHAM.

‘Exhibit D.’ Fifteen year equation policy. Policy No. 47.445. Amount \$2,000. The Northwestern National Life Insurance Company of Minneapolis, Minn. Age thirty. Premium annually \$38.32. In consideration of the application for this policy, which is made a part hereof, and the first payment thereunder made to this company on or before the delivery hereof, and the further payments as provided herein and indorsed hereon, during the continuance of this policy covenants and agrees with Joseph A. Irwin, who is constituted a member of this company during the continuance of this policy, and who is hereafter designated as insured, to pay to the children of the insured herein after designated as beneficiary, and in case of the beneficiary’s prior death (no other beneficiary having been designated by the insured) to the insured’s executors, administrators or assigns, \$2,000 within ninety days after acceptance at its home office of satisfactory proofs of the death of the said insured. If, after the date hereof, and while this contract is in full force, said insured shall become totally and permanently disabled, there shall be paid to him if he shall so request in writing, and upon satisfactory surrender and cancellation of this contract, one-half the amount thereof. No disability of any nature except as herein defined, shall entitle the said insured to any sum whatever, and the fact of total disability, as defined above, shall be determined as provided in the conditions indorsed hereon.

The conditions, provisions and benefits indorsed hereon form an essential part of this contract as fully as if they were recited at length over the signatures of the parties hereto.

In witness whereof, the Northwestern National Life Insurance Company of Minneapolis, Minn., has, by its president and secretary, signed this contract in the city of Minneapolis, State of Minnesota, this tenth day of May, 1901. (I. R. stamp \$1.60.) (Corporate seal.) W. F. Bechtel, president. Edw. M. Stickney, a secretary.

‘Exhibit E.’ Northwestern National Life Insurance Company, Minneapolis, Minn., May 10, 1901. Received of Joseph A. Irwin, thirty-eight and thirty-two hundredths dollars, being the first annual premium on policy No. 47,445 in the Northwestern National Life Insurance Company, for the term ending May 10, 1902. G. F. Getty, secretary. Per S. B.”

Much space in the record and briefs of counsel is devoted to questions raised and rulings of the court thereon as to

certain special pleas filed by appellant, but as we view the case, the rulings of the trial court as to these pleas are not now of controlling importance and need not be discussed.

To our minds, when this case was submitted to the trial court, it presented for determination but two questions—one as to whether “Exhibit B,” shown in the stipulation, is a part of the contract of insurance entered into by and between the parties—the other, as to whether the death of the assured was occasioned by reason of his being engaged in the hazardous occupation of coal mining mentioned in said exhibit. The first of these questions is one of law, the second is one of fact.

The stipulation recites that the assured contemporaneously signed, executed and delivered the two papers “Exhibit A” and “Exhibit B,” for the purpose of procuring a policy of insurance from appellant; and that thereupon “Exhibit D,” the policy upon which this suit is based, was executed and delivered to the assured. These three papers all considered and construed together, constitute the contract. This being true, it follows that if the assured’s death was occasioned by reason of his being engaged in the hazardous occupation of coal mining, then appellant was liable, under its contract, for only the sum of \$1,000.

As to the assured’s occupation at the time of his death and the cause of his death, the stipulation recites that assured was engaged with a crew of hands in sinking a coal shaft for the purpose of opening a coal mine; that the shaft had reached a depth of eighty feet and assured was at work at the bottom, when a rock car, while being hoisted, struck against a brace timber, tearing it loose and causing it to fall to the bottom of the shaft, upon the assured, whereby he was killed.

There is no better definition of the word “mining,” as that word is used in “Exhibit B” in this case, than that given in Webster’s International Dictionary, edition of 1898. Mining is there defined to be, “The act or business of making mines or of working them.” The assured was at the time and on the occasion of receiving the injury caus-

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ing his death, engaged in the act of making a mine from which coal was to be taken, was engaged in the hazardous occupation of coal mining, and his death was occasioned by reason of his being at that time so engaged.

Under the contract and facts as shown by the stipulation, appellant was liable to appellees for the sum of \$1,000 and no more. The stipulation discloses such facts as to the tender and final acceptance of it, as to bar appellees from any right to recover interest, and the payment and acceptance of the amount due, before the case came on for trial, left appellees with nothing upon which to base a judgment in their favor. The judgment should have been in favor of appellant.

The judgment of the Circuit Court is reversed.

**Valentine Wolf, James H. Maupin and Robert Curdie,
Partners, etc., v. The City of Alton.**

1. **PRACTICE**—*Demurrer to Declaration Containing One Good Count.*—A general demurrer can not be sustained to a declaration which contains one good count.

2. **SAME**—*Where the Record Will Not Support a Judgment on the Merits of the Case.*—Where the trial court has sustained a demurrer to the whole declaration, containing one good count, the court can not pass on the merits of the case. The errors assigned constitute the pleading in this court, and limit the scope of the appeal, and a judgment upon the merits would bind neither the parties to the suit nor the trial court.

Assumpsit.—Appeal from the Circuit Court of Madison County; the Hon. MARTIN W. SCHAEFER, Judge presiding. Heard in this court at the August term, 1902. Reversed and remanded. Opinion filed September 11, 1902.

LEVI DAVIS, attorney for appellants.

ALEX. W. HOPE and B. J. O'NEILL, attorneys for appellee.

MR. JUSTICE CREIGHTON delivered the opinion of the court.

This was an action of assumpsit in the Circuit Court of Madison County, by appellants against appellee.

The declaration consists of two counts; the first a special count upon an express contract, and the second a common count for money paid and expended by the plaintiffs for the use of the defendant at defendant's request. To this declaration appellee, defendant, interposed a demurrer both general and special, which the court sustained as a general demurrer. Appellants excepted and elected to stand by their declaration, and thereupon the court rendered judgment against appellants for costs. Appellants duly excepted and bring the case to this court by appeal.

Without reference to any of the questions raised as to the sufficiency of the first or special count, this case must be reversed, for no objection has been pointed out and none can be taken to the second count. It is in all respects good and sufficient.

"No doctrine has been longer settled or more constantly adhered to by this court than that a general demurrer can not be sustained to a declaration which contains one good count." *Lusk v. Cook*, *Beecher's Breese*, page 84; *Cowles et al. v. Litchfield*, 2 *Scam.* 356; *Israel v. Reynolds*, 11 *Ill.* 218; *Governor v. Ridgeway*, 12 *Ill.* 14; *Anderson et al. v. Richards et al.*, 22 *Ill.* 217; *Tomlin v. T. & P. R. R. Co.*, 23 *Ill.* 429; *Barber v. Whitney et al.*, 29 *Ill.* 439; *Nickerson et al. v. Sheldon*, 33 *Ill.* 372; *Reece et al. v. Smith*, 94 *Ill.* 362.

Counsel for appellee insist that we pass upon the "merits of this case." This we are powerless to do. The state of the record will not support such judgment. In *Ross v. Knapp, Stout & Co.*, 77 *Ill. App.* 424, the state of the record was the same as in this case, and counsel upon both sides earnestly requested us to pass upon the demurrer as to the special counts—to pass upon the merits of the case, and we undertook to do so. An appeal was taken from our decision to the Supreme Court, and that court declined to consider the merits of the case, contenting itself with deciding, as it had previously done in a number of cases, some of which are cited above, that the trial court erred in sustaining the demurrer to the whole declaration.

It is apparent that a judgment here, affirming this case

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upon the present state of the record, could not stand, and a judgment reversing the case can not be broader than the errors assigned upon the record. These are: "The court erred in sustaining the demurrer to the declaration" (as a whole). "The court erred in rendering judgment against appellants for the costs of suit." The errors assigned constitute the pleading in this court, the declaration, upon which the appeal is based, and limit the scope of the appeal. The Appellate Court has no power to pass upon questions not involved, and thereby bind either the parties to the suit or the trial court.

For the errors of the trial court in sustaining the demurrer to the declaration as a whole, and for rendering judgment against appellants for costs, the judgment is reversed and the cause remanded to the Circuit Court of Madison County for such other and further proceedings as to law and justice shall appertain.

The judgment of the Circuit Court is reversed and the cause remanded.

Annie Pavéy v. John H. C. Pavey.

1. APPELLATE COURT PRACTICE—*Rule 29.*—Where the defendant in error fails to file his brief in compliance with the rules of this court, the decree of the Circuit Court will be reversed and the bill of defendant in error dismissed *pro forma*, under rule 29.

Divorce.—Error to the Circuit Court of Gallatin County; the Hon. EDMUND D. YOUNGBLOOD, Judge presiding. Heard in this court at the August term, 1902. Dismissed. Opinion filed September 11, 1902.

W. R. McKERNON, attorney for plaintiff in error.

No appearance by defendant in error.

MR. JUSTICE WORTHINGTON delivered the opinion of the court.

This was a suit for divorce brought by defendant in error. A decree was rendered in his favor. The defendant to the

suit brings the case to this court by writ of error, and defendant in error having failed to file his brief, the decree of the Circuit Court is reversed and the bill of defendant in error is dismissed *pro forma*, under rule 29 of this court. An examination of the testimony in the record fails to show any valid reason why rule 29 should not be enforced.

CASES
DETERMINED IN THE
FIRST DISTRICT
OF THE
APPELLATE COURT OF ILLINOIS
DURING THE YEAR 1902.

**Morris Gershenow, for use of Lena Ruben, v. West
Chicago St. R. R. Co.**

1. **STIPULATIONS**—*When Court Will Not Take Notice of.*—A mere unfiled stipulation between parties is a thing to which its attention must be called if it is expected that the court will act thereon.

Garnishment.—Error to the Superior Court of Cook County; the Hon. SAMUEL C. STOUGH, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Affirmed. Opinion filed October 24, 1902.

ELIJAH N. ZOLINE, attorney for plaintiff in error.

LAWRENCE & FOLSOM, attorneys for defendant in error.

MR. JUSTICE WATERMAN delivered the opinion of the court.

The 18th day of October, 1894, plaintiff in error filed in the Superior Court an affidavit for a garnishee summons against the defendant in error.

Summons was issued and duly served on the defendant in error. Interrogatories addressed to the garnishee were filed by the plaintiff, to which the defendant in error filed an answer stating it was not indebted to said Morris Gershenow in any way and had no property belonging to him; it further answered that Morris Gershenow sued the defend-

ant in error in the United States Circuit Court for \$30,000 for personal injuries, in which suit it filed a plea of not guilty.

To this the plaintiff filed a replication traversing the answer.

April 3, 1899, the case was called for trial and an order dismissing the suit for want of prosecution entered on motion of defendant's attorney with judgment for costs against plaintiff.

Seven terms thereafter, to wit, November 9, 1899, the plaintiff appeared and moved to have the judgment dismissing the suit set aside, and in support thereof filed the affidavit of the attorney for the plaintiff, setting forth, among other things :

"That the said cause was regularly reached for trial on the trial call before one of the judges of the Superior Court November 17, 1898, and was passed by the court by stipulation of the parties hereto. That above cause shall be taken up only after five days previous notice is given by either party. Affiant further stated that neither he nor his client were ever served with notice that above cause was to be called again for trial, and in violation of said order and of said stipulation, said cause, without notice to this affiant, was dismissed on motion of defendant, April 3, 1899."

The court refused to set aside the judgment and reinstate the cause.

The Superior Court had full jurisdiction over the subject-matter and the parties when, so far as appears, in the due course of business upon a regular call of the docket, the suit was dismissed for want of prosecution.

It may be that the plaintiff did not give five days notice and set the cause down for trial, but such condition is not negatived by the affidavit, although the affidavit does state that the cause was dismissed without notice to the affiant, plaintiff's attorney. However this may be, the case was not one wherein the court had power, after the lapse of the term, to set aside the judgment. Judgment obtained as was this, could not, at common law, have been set aside under writ of *coram nobis*, and can not in this state, upon motion.

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The stipulation was not on file nor of record, and the court committed no error in dismissing the cause, because it had neither knowledge nor notice of such stipulation. There are matters of fact, such as the death of the defendant, of which a court is bound to take notice. *Life Association of America v. Fassett*, 102 Ill. 315.

A mere unfiled stipulation between parties is a thing to which its attention must be called if it be expected that the court will act thereon. The stipulation upon which plaintiff relies was not signed by the defendant nor an attorney who had appeared in the cause, nor by any person who, so far as appears, was an attorney or authorized to act for the defendant. Van Vechten & Veeder had alone appeared as the defendant's attorneys. The stipulation is signed "For N. C. St. R. R. Co., A. M. Savage, per H. Saunders. E. N. Zoline, attorney for plaintiff."

That A. M. Savage was at any time an attorney or agent of the defendant, or that H. Saunders had any right to act for him does not appear. The motion to set aside the judgment came before the court without it being made to appear that the defendant had entered into any stipulation. Even the notice to set the judgment aside was served upon J. W. Duncan, who, affiant says, is the defendant's attorney, but who, it does not appear, was at any time its attorney in this cause or authorized to act for the defendant therein.

The order of the Superior Court refusing to set aside the judgment is affirmed.

Eleanor C. Hall v. Maria Muggeridge, Executrix.

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1. PRACTICE—*When Continuance Will Not be Granted.*—Plaintiff had the deposition of her principal witness, who resided in Wisconsin, taken in Chicago, and afterward refused to pay what the notary demanded. She then attempted to have the deposition again taken in Wisconsin, but failed to receive it in time for the trial. *Held*, that a continuance should not be granted upon an affidavit which fails to show

what amount was claimed by the Chicago notary, or that it was more than she was able to pay. Whatever amount he demanded she might have paid, under protest, and thus procured the filing of the deposition, and thereafter, by direct action of the court in which the cause was pending, or otherwise, compelled him to refund whatever sum he had wrongfully exacted.

Claim in Probate.—Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Affirmed. Opinion filed October 24, 1902.

Eleanor C. Hall having filed her claim in the Probate Court of Cook County against the estate of Elizabeth C. Hale, the same being disputed, was, December 14, 1899, allowed to the extent of \$550. From such order of allowance she appealed to the Circuit Court. Pending such appeal, it was agreed between her and the executrix of said estate that the deposition of George Kelly, a resident of Mineral Point, Wisconsin, might be taken in Chicago. Accordingly, October 29, 1900, a dedimus was issued to William J. Farwell of Chicago to take the deposition of said Kelly. December 27, 1900, in pursuance of the aforesaid agreement the deposition of said Kelly was taken in Chicago before William J. Farwell. Thereafter a dispute arose between Farwell and appellant as to the amount to which he was by law entitled for taking said deposition and he refused to file the same with the clerk of the Circuit Court, unless paid the amount demanded by him. Upon such refusal appellant at once served notice on said Farwell and applied to the Circuit Court for a rule on Farwell "to file said deposition in court upon being paid or tendered the fees allowed by law for taking said deposition." This motion was heard February 16, 1901, and denied by the court. Thereupon upon the same day appellant served notice upon the defendant that she would sue out a dedimus to take the deposition of said Kelly at Mineral Point, Wisconsin, upon written interrogatories; and on the 26th day of February a dedimus was issued and forwarded to the notary public at Mineral Point, Wisconsin, with directions to take and return said deposition at the

Hall v. Muggeridge.

earliest possible moment. Appellant also had a subpoena served upon one T. F. McNulty to attend as a witness upon the trial of said cause. March 6, 1901, the cause for the first time was reached for trial, whereupon appellant moved for a continuance on account of the absence of "testimony;" showing the efforts which she had made to obtain the deposition of said Kelly and other witnesses and what she expected to prove by said Kelly, also what she expected to prove by T. F. McNulty, Simon Strauss, Frank Allen and Mrs. Elizabeth Moody, upon three of whom there had been an unsuccessful attempt to serve subpoenas. The defendant offered to admit that said witness Elizabeth Moody, if present, would testify as alleged in the affidavit relating to her testimony. But the court having heard said affidavit and seen the subpoenas, denied the said motion and refused to continue the said cause. Thereupon the appeal of said Eleanor C. Hall from the judgment in her favor of \$550 was dismissed, from which order refusing to continue the cause and dismissing the appeal, this appeal is prosecuted.

GEO. W. HALL, attorney for appellant.

ARCHIBALD CATTELL, attorney for appellee; GEO. P. CARY, of counsel.

MR. JUSTICE WATERMAN delivered the opinion of the court.

Appellant urges that she made every possible effort to obtain the deposition of George Kelly, her principal witness. We do not agree with this contention. What amount was by her tendered to Farwell for his fees is not shown. All that appears is, that appellant tendered the full amount which she understood he was allowed by law for taking the deposition of Kelly. Nor does it appear that upon the application by her made for a rule by the Circuit Court upon Farwell to file said deposition, the court was informed what amount she had tendered Farwell. Nor does it appear that the amount claimed by Farwell was more than she was able to pay. Whatever amount he demanded she

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might have paid, under protest, and thus procured the filing of the deposition, and thereafter, by direct action of the court in which the cause was pending, or otherwise, compelled Farwell to refund whatever sum he had wrongfully exacted. It may be, that had the Circuit Court been informed as to the amount which appellant says she tendered Farwell, it would have ordered him to bring the deposition into court that it might determine whether he had been offered the fees to which he was lawfully entitled in the matter, and if such were found to be the case, have required the same to be filed instanter. As it was, so far as appears, all the court had to act upon, was the opinion of appellant that she had tendered to Farwell his lawful fees. It is not contended that without the deposition of Kelly appellant could have made out a case. The failure to have his deposition in court being entirely her fault, the court properly refused to continue the cause and dismissed her claim.

The judgment of the Circuit Court is affirmed.

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Lizzie Rumbold v. Supreme Council Royal League.

1. EVIDENCE—*Overcoming Presumption Against Suicide*.—Evidence that carbolic acid was taken, in a dose sufficient to destroy life, that it was carefully placed in the back of the mouth, that the deceased had been absent from home five days apparently wandering aimlessly about, that his linen had not been changed and was soiled, that he was found at midnight in a dying condition in a retired place far from his home, in a part of the city where there was apparently no occasion for him to be, and that he apparently made no outcry, though he must have known that he had taken poison, all tend to show intentional self-destruction, and suffice to overcome the presumption of law against suicide.

2. GARNISHMENT—*Duty of Party Garnisheed, to Creditor*.—The law requires a party, when garnisheed, to claim for his creditor the benefit of an exemption allowed by law.

Assumpsit, upon a benefit certificate. Error to the Superior Court of Cook County; the Hon. AXEL CHYTRAUS, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Affirmed. Opinion filed October 24, 1902.

Rumbold v. Supreme Council Royal League.

UTT BROTHERS, attorneys for plaintiff in error.

MILLARD R. POWERS, attorney for defendant in error.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

This was a suit upon a benefit certificate issued to Harry H. Rumbold, husband of the plaintiff in error, which entitled the latter to \$4,000 upon the death of her said husband from any cause except suicide. Said certificate contained a provision: "If any member shall die by his own act or hand, sane or insane, his beneficiary or beneficiaries shall receive only one-half of the face value of his benefit certificate." The question upon the trial was whether plaintiff's husband committed suicide.

The deceased lived on Throop street in the West Division of Chicago, but he was found a little after midnight, July 7, 1897, by the police of the Hyde Park station, about a hundred feet from the shore of the lake, near Fifty-third street. He was lying on his back near a tree, apparently unconscious and breathing heavily. He was well dressed, had a gold watch and some small change on his person, and his clothing was not disarranged. He lived only a few minutes after being taken to the police station. An inquest and a post mortem examination were had. The coroner's physician who made the examination testified on the trial of this case that in his opinion, as a result of the examination, death was caused by carbolic acid, about two table-spoonfuls, taken internally, and that the condition of the organs of the body were characteristic of carbolic acid poisoning. He states that if the acid is placed in the back of the mouth it causes the back part of the tongue to become shriveled and whitened, a condition which he found existing in this case; that he found the gullet white and red, corrugated and thickened and smelling of carbolic acid, and that the heart contained dark fluid blood also smelling of the same. He found no indication of any disease that would produce death. Aside from the congestion ascribed to the acid, the organs of the body were apparently healthy. Evi-

dence was introduced tending to show that a sufficient quantity of this acid to produce death could not be taken without knowledge on the part of the victim that he had taken something unusual, but its effect would not be so sudden as to deprive him of the power of moving about and making an outcry sufficient to attract attention. The place where the deceased was found was near East End avenue, where an outcry, it is said, would have been likely to attract attention. On the other hand it appears that no quantitative test or chemical examination of the contents of the stomach was made, and a search where the dying man was found, made, however, with a lantern, that same night, failed to discover any bottle or similar receptacle from which the acid could have been taken. The officers who carried the man to the ambulance noticed nothing unusual about the mouth, and did not perceive the smell of carbolic acid. There is evidence to the effect that deceased had some bowel or stomach trouble at or just before the time when he last left his home, July 2d, five days before his death, and testimony was introduced in behalf of the plaintiff tending to show that certain medicines containing carbolic acid used for such disorders are sold by druggists without prescriptions; the inference being drawn that death in this case might have accidentally resulted from the use of some such remedy. There is no evidence tending to show that any such medicine was used. The deceased was a sober and industrious man, with a happy disposition, attached to his wife and son, and his domestic relations were happy.

In support of the contention that her husband committed suicide, and plaintiff is not therefore entitled to recover the full amount of the benefit certificate, the defendant introduced evidence intended to show that he was at the time involved in financial difficulty. It was shown that he owed a few persons small sums of money, scarcely large enough to cause anxiety, however, and that he held two or three pawn tickets for gold watches, it is said, pledged at a pawnshop. He had lost a place in the employ of the city about

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two years before, and was intending to take the civil service examination in the hope of again obtaining city employment. But the plaintiff testifies that he was earning at the time of his death from fifteen to twenty-five dollars a week, and, if so, no motive for suicide apparently existed for want of sufficient income.

There was, however, one transaction upon which defendant especially relies as showing a motive for self-destruction. One Mrs. Shannon, the widow of a garbage contractor, testifies that in April preceding his death she had loaned the deceased \$500 to make a deposit with the city with a bid for a garbage contract, he promising that if he obtained it he would put her teams to work. Later she became anxious about the money, and June 23d, Rumbold wrote her that it was safe, that he was sure of one ward, and would like her to wait until the 28th. Upon that day he wrote again that he would know by Wednesday following, and that if he did not get a ward he would return her money Thursday noon. Mrs. Shannon testifies that the money was not returned to her, and she sent her brother-in-law, one McCauliffe, to see Rumbold in her behalf. McCauliffe states that he had a conversation with Rumbold; told him he knew he had not bid on these contracts, demanded an explanation and threatened to commence proceedings to collect the money unless it was returned. He says that Rumbold told him that he had the money, and intended to pay it back, and that "it was some other fellow's fault that threw him down," mentioning the name. This interview is said to have occurred the latter part of June or the first or second of July. The second day of July Rumbold left home in the morning, telling his wife he was going to the city hall to see about taking the civil-service examination, and about getting a garbage contract for Mrs. Shannon. He was not seen again by any of his family or friends, so far as appears, until after his death, five days after, July 7th.

Plaintiff sought to show that Mrs. Shannon did obtain a garbage contract, and that it was taken in McCauliffe's

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name for her. The trial court, however, sustained objections to this line of examination, and refused plaintiff's offer to show that a deposit of \$500 and a bid were made by McCauliffe in his own name, June 28th; that afterward, July 9th, a bond was given, the \$500 deposit was withdrawn and the contract let to McCauliffe for Mrs. Shannon for the ward Rumbold was trying to obtain. In reply to a question by the court, however, plaintiff's attorneys stated that they could not show directly that McCauliffe got this money from Rumbold, but insisted that all the facts should go to the jury. The objection was sustained to this offer, and plaintiff urges that it was error to exclude the testimony offered. We think the evidence might very properly have been admitted. Plaintiff in her testimony states that she overheard part of a conversation between Rumbold and McCauliffe at her house a few days before her husband's death, in which the latter said he would get a contract in his own name, and Rumbold told him to do so. The only purpose of the introduction of the transaction with Mrs. Shannon and McCauliffe was to show a motive for Rumbold's suicide. He could not speak for himself. If the money was in fact applied for Mrs. Shannon's benefit, the alleged motive disappears.

But if the entire evidence of Mrs. Shannon and McCauliffe had been stricken out, we are of opinion that the undisputed facts and circumstances sufficiently justify the verdict of the jury. The evidence that carbolic acid was taken, in a dose sufficient to destroy life, that it was carefully placed in the back part of the mouth, that the deceased had been absent from home five days apparently wandering aimlessly about, that his linen had not been changed and was soiled, that he was found at midnight in a dying condition in a retired place far from his home, in a part of the city where there was apparently no occasion for him to be, and that he apparently made no outcry, though he must have known he had taken poison, all tend to show intentional self-destruction, and suffice in our opinion to overcome the presumption of law against suicide.

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Cross-errors were assigned by the defendant. It is urged that the latter is entitled to a credit of \$130 paid in satisfaction of a judgment of garnishment obtained before a justice of the peace, for the use of one Landon. By the provisions of Sec. 254, Chap. 73, R. S. of Illinois, the money due plaintiff in error on the benefit certificate was not liable to garnishee or other process, legal or equitable, to pay any debt or liability of a policy or certificate holder. The defendant did not make this defense to the proceeding, and now contends that it was not bound to do so, because it had drawn its check for the amount now found to be due plaintiff and tendered the same to her, and claims thereafter to have held the money as trustee for the plaintiff, and as such to have been amenable to garnishee process.

Plaintiff in error refused to accept a check for \$2,000 on the ground that her husband had not committed suicide, and that she was entitled to the full amount of the certificate, \$4,000. But there is no evidence that the fund had been set aside by defendant, or its character in any respect changed. The law requires a party, when garnisheed, to claim for his creditor the benefit of an exemption allowed by law. *C. & A. R. R. Co. v. Ragland*, 84 Ill. 375; *Welker v. Hinze*, 16 Ill. App. 326. The defendant's liability was the same in all respects after as before it tendered its check to the plaintiff. In *Martin v. Martin*, 187 Ill. 200, the money had been collected by an agent of the beneficiary in whose hands it had been garnished. That case is not in point under the facts before us.

The judgment of the Superior Court must be affirmed.

Lawton C. Bonney v. John A. King et al.

103 601
a201s 47

1. WORDS AND PHRASES—*Abuse Defined*.—Abuse implies irregular and improper use, not merely regular and proper use with a bad motive.
2. MALICIOUS PROSECUTION—*Requisites of Declaration*.—In an action for the malicious prosecution of civil suits, the declaration must show

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that the suit complained of has been brought to an end the same as in case of the malicious prosecution of a criminal proceeding, and for the same reason, viz., that the party might recover in his action for malicious prosecution and yet be guilty of, and afterward be convicted of, the original charge.

Trespass on the Case, for the malicious bringing of civil suits. Error to the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Affirmed. Opinion filed October 24, 1902.

Plaintiff in error brought his action in trespass on the case to recover damages for injuries alleged to have been inflicted by malicious acts of the defendants in bringing certain civil suits against him. The declaration states that the purpose of the suits was not the collection of money due from plaintiff in error, but to compel the latter to execute a power of attorney authorizing defendant, Witbeck, to give away without consideration, stock belonging to plaintiff, in pursuance of a conspiracy to acquire plaintiff's stock in the Chicago General Railway Company, or to wreck said company. It is charged that to accomplish this purpose defendants began suits at law against plaintiff upon notes signed by the latter in behalf of the company, which had been paid by defendant Witbeck as agent of the company, out of the funds of the company; also a suit in replevin against a third person for possession of certain shares of stock belonging to plaintiff. The suits were brought, it is said, in the name of Witbeck, and the part in the alleged conspiracy charged against the other defendant, King, is that "he was engaged in wickedly and willfully exciting and stirring up suits and quarrels between the people of this State," and that both defendants sought wrongfully to injure appellant in respect to his property, credit and reputation, and succeeded in such purpose. The trial court sustained a general demurrer to the declaration, and this is assigned as error.

LYMAN M. PAINE, attorney for plaintiff in error.

FLOWER, VROMAN & MUSGRAVE, attorneys for defendants in error.

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MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

The acts complained of in the declaration are, first, a request that plaintiff sign a power of attorney authorizing certain stock and bonds of the railway company owned by him, to be sold with the stock and bonds of other parties to effect a transfer of the controlling interest in the company, the proceeds to be duly accounted for; and second, the bringing of certain suits. It is evident that the request from defendants to sign such power of attorney did not and could not, of itself, give the plaintiff any right of action, no matter what the motive, nor how unreasonable such a request may have been. The only acts complained of by which the plaintiff could have been damaged are the suits, which it is claimed were maliciously brought as a means of coercing the plaintiff into signing the power of attorney. The charge that these were brought pursuant to a conspiracy to wrongfully coerce and injure the plaintiff is mere matter of explanation in aggravation of the alleged injury caused by bringing the suits. It is the acts of the defendants and not the conspiring to do the acts, which caused whatever injury he may have sustained and of which he complains. These suits are still pending and undetermined. Whether or not they are based upon good causes of action against plaintiff in error can not be ascertained in the case before us. It is conceded by plaintiff that the declaration would be defective in not alleging the termination of the suits in his favor, if this "were the ordinary declaration in case for malicious prosecution," and if the demurrer did not admit the allegation of the declaration that the notes sued on had been paid. It is urged that this is an action, not for the malicious prosecution, but for the malicious bringing of the suits. We fail to see force in the alleged distinction. There is no averment showing an abuse of the process of the courts. The mere bringing of suits, even with an ulterior motive of coercing the plaintiff, would not of itself constitute a malicious abuse, though it might constitute a malicious use of legal process. The latter is not

necessarily unlawful. It may be a use of the right every one has under the law to bring suit to establish a legal claim, and the fact that such claim, real or disputed, would not have been asserted except for the existence of an ulterior motive, does not make its prosecution unlawful. As is said in *Jeffery v. Robbins*, 73 Ill. App. 353-361, "Abuse implies irregular and improper use—not merely regular and proper use with a bad motive."

In actions for malicious prosecutions of civil suits, "the declaration must show that the suit complained of has been brought to an end the same as in cases of the malicious prosecution of a criminal proceeding and for the same reason viz., that the party might recover in his action for malicious prosecution and yet be guilty of and afterward convicted of the original charge." *Rothschild v. Meyer*, 18 Ill. App. 284. It is urged that in the case at bar this rule should not apply because the declaration alleges the notes sued on had been paid by Witbeck out of the funds of the company, and that the demurrer so admits. The averment is not, however, such as if true would certainly suffice to bar recovery.

Plaintiff in error argues that he is entitled to redress before final judgment in his favor in said suits because in Sec. 19, Art. 2, of the State Constitution, it is said that "every person ought to find a remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation," etc. We find in this record nothing to indicate that plaintiff in error has been deprived of any constitutional right. If the defendants in error have been guilty of a violation of the criminal statutes defining common barratry and conspiracy as plaintiff alleges, the law affords a method of reaching them. But whatever the facts, the declaration shows that this suit is at least prematurely brought, and the judgment of the Circuit Court must be affirmed.

Johanna Metzger v. The City of Chicago.

108	605
111	1488

1. **SIDEWALKS—*Slipperiness Caused by Snow and Ice.***—Mere slipperiness of a sidewalk occasioned by ice or snow, not being accumulated so as to constitute an obstruction, is not such a defect as will make the city liable for damages occasioned thereby.

2. **ORDINARY CARE—*When Absence of Evidence of Fault Will Justify Inference of.***—When the circumstances attending an accident are in evidence, the absence of evidence of fault on the part of the injured party will justify an inference and be accepted as proof of the exercise of ordinary care.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. AXEL CHYTRAUS, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Affirmed. Opinion filed October 24, 1902.

Appellant sued to recover for personal injuries received from a fall on a sidewalk. The cause was submitted upon the plaintiff's evidence. The jury returned a verdict finding appellee not guilty, and from the judgment entered in accordance with the finding this appeal is prosecuted.

The accident occurred in the forenoon of December 12, 1898, upon the sidewalk extending along the south front of the city hall and county building on Washington street, Chicago. There was a drinking fountain used to water horses at the edge of the sidewalk not far from the south entrance to the city hall. Evidence was introduced tending to show that at the time of the accident the weather was severely cold, and that there was a thin coating of ice on that part of the sidewalk, and extending from three to five feet from the edge of the walk, caused, it is said, by the overflow of water. The fountain was not running at the time of the accident. Appellant states that she did not see the ice upon which she says she slipped and fell, there being, it is said, a light "flurry" of snow, which served to conceal it. The snow was not, however, thick enough in some places to cover the sidewalk. The entire fall of snow that day, according to testimony from the weather bureau, amounted to only eight-tenths of an inch. One of the flag-

stones of which that part of the sidewalk was composed, was broken longitudinally in the center, forming a slight depression extending east and west along the walk three or four feet from the fountain. In this depression there was ice two or three inches deep, forming a level surface. The sidewalk at that point was at least sixteen feet wide.

F. H. TRUDE, attorney for appellant.

ANDREW J. RYAN, City Attorney, for appellee; WILLIAM L. GAHAN, of counsel.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

It is urged in behalf of appellant that the city is liable for failure to exercise reasonable care to keep the sidewalk in repair and free from a dangerous obstruction. It is not claimed that the city had actual notice of the existence of the broken stone or of the ice on the walk. It is urged, however, that it had constructive notice, not because of any evidence tending to show how long the ice had been there, but because, since the alleged obstruction was about eighty or ninety feet from the entrance to the city hall, it should be presumed that "its existence must in the natural course of events have been known to the officials of appellee." The evidence, however, does not show the existence of anything like an obstruction to the use of the walk. It shows that upon the edge of a sidewalk at least sixteen feet wide, there was ice extending from three to five feet from the outer edge of the walk. This rendered it necessary for one passing close to the fountain where the ice was and where it might naturally be expected to be, to use more care. But as is said in *Mareck v. City of Chicago*, 89 Ill. App. 358, "mere slipperiness of a sidewalk occasioned by ice or snow, not being accumulated so as to constitute an obstruction, is not such a defect as will make the city liable for damages occasioned thereby." The formation of ice on the sidewalk in this climate is an ordinary incident of winter experience. It occurs in cold weather wherever water gets on a walk

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from any cause, whether from melting snow, a pipe suddenly bursting, a fire engine or a drinking fountain. It can not ordinarily be prevented, and we do not think it material as affecting the city's liability, whether the water so frozen comes from one or another of such sources. It would not be seriously contended where the sidewalk and street are covered with ice caused by the freezing of water from a fire engine or hose used to put out a fire, that the city is liable to one injured by slipping on such icy street or sidewalk, before an opportunity had been afforded to clear the street. Nor do we think it can be held liable where water is splashed over or escapes from a drinking fountain on the edge of a walk—an entirely proper thing for a city to maintain—unless it should be made to appear that the city has been negligent in the construction or operation of such fountain, or had allowed ice to remain where it endangered passers-by after notice of the existence of such a danger. No such evidence is before us in the present case. It may be true that the ice about the fountain was due to the overflow of water therefrom and not from what may be called natural causes, such as rain or melting snow. But this was not such an obstruction that notice of its existence can be presumed, merely because it was near the entrance to the city hall. The sidewalk was at least sixteen feet wide, in a much-traveled part of the city. But the fountain was in plain view of passers-by, and the ice also, until covered by a "flurry of snow," which was still falling at the time of the accident.

Nor does it appear that the city had notice that the slight depression in the flagstone caused by the break had become filled with water, or that the defect was such as could be dangerous to passers-by. A mere break in a stone pavement which does not endanger its use under ordinary conditions, does not necessarily require repair, and the failure to so repair it does not of itself and necessarily constitute negligence. Such a broken stone, causing only a slight displacement, may be as serviceable and safe as ever, and there is no evidence that it was not so in this case, and

there is no evidence as to when the break occurred. No notice of any danger from this source can be presumed, and there is no evidence whatever of actual notice. The city was not called upon to remove a possible source of danger of which it had no notice.

The question of the city's negligence was submitted to the jury. We find no reason in this record justifying interference with the verdict. This is not a case where snow or ice had accumulated in ridges or uneven shapes such as would necessarily render passage along the walk dangerous.

It is urged that appellant was shown by the facts and circumstances in evidence in the case to have been in the exercise of ordinary care. This was a question for the jury. The fountain was in plain sight, and according to the testimony "the ice hung from the fountain and there was a little over the edge of the sidewalk." The ice so hanging was not concealed by the light fall of snow, and it would seem should have indicated the possible presence of ice on the sidewalk below and around the fountain.

Objection is made to an instruction to the effect that appellant must prove "by facts and circumstances" that she was actually in the exercise of due care and caution. The language used, so far as it relates to the character of the proof required, is perhaps open to objection, and might have been harmful in the absence of such evidence as that last above referred to. Ordinarily "when the circumstances attending an accident are in evidence, the absence of evidence of fault on the part of the injured party will justify an inference and be accepted as proof of the exercise of ordinary care." *C. & A. R. R. Co. v. Crowder*, 49 Ill. App. 154-161. But with the evidence given in appellant's behalf that the fountain and the overhanging ice indicating an overflow on the sidewalk were in plain sight, we do not regard the instruction as harmful.

We need not discuss at length the other objections urged to the giving and refusal of instructions. We have carefully considered them and the authorities cited in their support. It is clear that the ice in question did not "obstruct"

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the walk. It rendered more care necessary in passing over it, but it was clearly not an "obstruction" in any sense of the word; and if it had been, the absence of any proof of notice to the city, or of negligence in the construction and operation of the fountain or in the construction of the walk seem to entirely justify the verdict of the jury and the judgment of the court. We find no reversible error in the record and for the reasons indicated the judgment of the Superior Court must be affirmed.

103	609
a209s	252

Charles F. Wenham v. James H. Mallin et al., Executors.

1. **ASSIGNMENT OF WAGES—*When Valid.***—An assignment of wages to be earned under an existing employment by a private person is valid and enforceable if made in good faith and for a valuable consideration.

2. **BANKRUPTCY—*Effect of Discharge upon Debt.***—A discharge in bankruptcy is analogous in its effect to the statute of limitations; it neither pays nor discharges the debt, but suspends the right of action thereon. Valid liens are not by it removed.

3. **INTEREST—*By Contract in Illinois.***—In this state it is lawful to contract for interest at the rate of seven per cent per annum; a contract for more is not only usurious but deprives the lender of all interest.

4. **SAME—*When a Court of Equity Will Relieve Against Usurious Interest.***—Although the statute may have made usurious loans and obligations absolutely void, yet if a borrower brings a suit in equity for the purpose of having a usurious bond or other security surrendered and canceled, the relief will be granted by a court of equity only upon condition that the complainant does equity by repaying to his creditor that which is justly and in good faith due, that is, the amount actually advanced, with lawful interest, unless the statute expressly prohibits the court from imposing such terms as a condition of relief.

5. **EQUITY—*Party Seeking Equity Must Do Equity.***—A court of equity will not confer its equitable relief upon a party seeking its aid, unless he will acknowledge and concede all the equitable rights and dividends justly belonging to the adversary party growing out of or necessarily involved in the subject-matter of the controversy.

Bill to Have an Assignment of Wages Declared Void, and for an Injunction.—Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Reversed and remanded. Opinion filed October 24, 1902.

James H. Mallin, being in the employment of Armour & Co. from month to month, on a salary of \$100 per month, borrowed money from appellant at usurious rates of interest, and so obtained \$342 more than he has paid back. June 3, 1898, to secure such indebtedness to Wenham, he executed and delivered an assignment of wages, in words and figures as follows, to wit:

"For a valuable consideration to me in hand paid by C. F. Wenham, the receipt whereof is hereby acknowledged, I do hereby transfer, assign and set over to the said C. F. Wenham, his heirs, executors, administrators or assigns, all salary or wages and claims for salary or wages due, or to become due me from Armour & Co., or from any other person or persons, firm, copartnership, company, corporation, organization or official by whom I am now, or may hereafter become employed, at any time before the expiration of ten years from the date hereof.

"I do hereby constitute irrevocably the said C. F. Wenham, his heirs, executors, administrators or assigns, my attorney, in my name to take all legal measures which may be proper or necessary for the complete recovery and enjoyment of the claim hereby assigned, and I hereby authorize, empower and direct the said Armour & Co., or any one by whom I may be employed as above, to pay the said demand and claim for wages or salary to the said C. F. Wenham, his executors, administrators or assigns, and hereby authorize and empower him or them, to receipt for the same in my name.

Chicago, Ill., 3rd day of June, 1898.

J. H. MALLIN."

May 3, 1899, Mallin filed his petition in bankruptcy. His indebtedness to Wenham was scheduled in the bankruptcy proceedings, and Wenham had notice thereof. October 23, 1899, he obtained his discharge in bankruptcy. Subsequently Wenham brought suit in the name of Mallin for the use of Wenham v. Armour & Co., claiming the wages of Mallin, by virtue of the above assignment. Mallin thereupon, without offering to repay the \$342 or any part thereof, applied to a court of equity, praying that said assignment be declared null and void, and that Wenham be enjoined and restrained from prosecuting any suit against

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Armour & Co., or in any manner interfering with Mallin's salary. On the trial it appeared that in September, 1898, Mallin agreed to pay \$5 per week to Wenham, and these payments were made for thirty-two weeks. Wenham attempted to show that Armour & Co. consented to hold out \$5 per week for Wenham until Mallin's indebtedness to him was paid. The court would not permit this showing to be made and entered a decree perpetually enjoining Wenham from in any manner attempting to enforce the said assignment, either against Armour & Co. or any other or future employer of Mallin, and enjoined Armour & Co. from paying to Wenham under said assignment any salary or wages earned by him, Mallin. From which decree this appeal is prosecuted.

MORSE IVES, attorney for appellant.

H. H. REED, attorney for appellees; A. R. URION and A. F. REICHMANN, of counsel.

MR. JUSTICE WATERMAN delivered the opinion of the court.

It is well settled that an assignment of wages to be earned under an existing employment by a private person is valid and enforceable if made in good faith and for a valuable consideration. Volume 2, second Ed. Am. & Eng. Ency. of Law, p. 1031; Thayer v. Kelley, 28 Vt. 19; Carter v. Nichols, 58 Vt. 553; Kane v. Clough, 36 Mich. 436; Garland v. Harrington, 51 N. H. 409-413; Hawley v. Bristol, 39 Conn. 26; Brackett v. Blake, 7 Metcalf, 335; Crouch v. Martin, 2 Vernon's Rep. 595; 5th Ed., Drake on Attachment, Sec. 612.

It is urged that the wages of Mallin are by statute exempt and therefore the decree of the court below was properly entered. There is no such exemption. Certain real and personal property is exempt "from execution, writ of attachment and distress for rent; and the wages of the head of a family residing with the same are to the extent of \$50 exempt from garnishment." Sec. 14 of Chap. 62, R. S.

There is no law forbidding any natural person from selling or assigning any property he has, while there are laws providing that certain property can be conveyed or mortgaged only in pursuance of certain statutes.

Was the assignment rendered nugatory by the discharge in bankruptcy? A discharge in bankruptcy is analogous in its effect to the statute of limitations; it neither pays nor discharges the debt but suspends the right of action thereon. Valid liens are not by it removed. *Bush v. Stanley*, 122 Ill. 406; *Pease v. Ritchie*, 132 Ill. 638-646; *Douglas v. Russell*, 4th Simons Ch. Rep. 524.

The assignment was a security, frail, indeed, as it might at any time be rendered worthless by action of appellee or of Armour & Co. The assignment creates a right only against wages earned by appellee in the service of Armour & Co., because it was and is good only as to an employment existing when it was made; yet it was a security, a property right enforceable, so far as it did not contravene any law.

It never was and is not enforceable for usurious interest; nor for interest at all if there were an exaction of usurious interest.

In this state it is lawful to contract for interest at the rate of seven per cent per annum; a contract for more is not only usurious but deprives the lender of all interest. Appellee does not deny the reception from appellant of \$342 more than he has paid back; while claiming that he has been from this debt discharged in bankruptcy, he does not deny that a valid indebtedness to such amount existed before such discharge.

Under such circumstances he has applied to a court of equity to, without the payment of a penny, relieve him from the effect of a security he gave, valid for all the money he actually obtained, of which no part has been returned.

Having come into a court of equity he can obtain relief only in accordance with equitable principles. It is a maxim of equity that he who seeks equity must do equity. No principle is, in the cause of equitable procedure, of greater consequence.

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In its broadest sense it embraces the foundation of all equitable procedure. It is a principle of most extensive application and may be applied in every kind of equitable litigation.

A court of equity will not confer its equitable relief upon a party seeking its aid, unless he will acknowledge and concede all the equitable rights and dividends justly belonging to the adversary party, growing out of or necessarily involved in the subject-matter of the controversy. Pomeroy's Eq. Jurisprudence, Secs. 385-388.

Although the statute may have made usurious loans and obligations absolutely void, if a borrower brings a suit in equity for the purpose of having a usurious bond or other security surrendered and canceled, the relief will be granted by a court of equity only upon condition that the complainant does equity by repaying to his creditor that which is justly and in good faith due—that is, the amount actually advanced, with lawful interest—unless the statute expressly prohibits the court from imposing such terms as a condition of relief. Pomeroy's Eq. Jurisprudence, Sec. 391; Snyder v. Griswold, 37 Ill. 216; Cushman v. Sutphen, 42 Ill. 256; McKendree Tooke et ux. v. Newman et al., 75 Ill. 215; Clark v. Finlon, 90 Ill. 245.

The same principle is applicable to a bill to set aside an unwarranted and illegal tax sale. Reed v. Tyler, 56 Ill. 288.

The decree of the Circuit Court is reversed and the cause remanded, with directions to dismiss the bill for want of equity.

Hopkins Amusement Company v. Charles Frohman.

108	613
105	*529
a202s	541

1. **TRADE-MARK**—*Equity will Restrain the Unauthorized Use of.*—A person has a valuable interest in the good will of his trade or business, and having adopted a particular label, sign or trade-mark indicating to his customers that the article bearing it is made or sold by him or by his authority, or that he carries on business at a particular place,

he is entitled to protection against one who attempts to deprive him of his trade or customers, by using such labels, signs, or trade-mark without his knowledge or consent, and where one has by contract with the author, become the owner of the exclusive right to produce a play based upon a character created in a book by such author, and has adopted a name for such drama as his trade-mark to distinguish it from all other productions, plays or dramas, he has the exclusive right to produce, perform and represent such drama under such title.

2. *SAME—Ground upon Which Simulation is Prohibited.*—The enforcement of the doctrine that trade-marks shall not be simulated does not depend entirely upon the alleged invasion of individual rights but as well upon the broad principle that the public are entitled to protection from the use of previously appropriated names or symbols in such a manner as may deceive them by inducing or leading to the purchase of one thing for another.

Bill for an Injunction.—Appeal from the Circuit Court of Cook County; the Hon. EDWARD P. VAIL, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Affirmed. Opinion filed October 24, 1902.

This is an appeal from a decree perpetually enjoining appellant from advertising, announcing, producing or performing a play entitled "Sherlock Holmes, the Detective," under the trade-mark "Sherlock Holmes" or from in any manner using the same.

The bill of complaint sets forth at length that appellee, a resident of New York, is a theatrical manager; that A. Conan Doyle is the author of a book entitled "The Sign of the Four," in which he created the character known as "Sherlock Holmes," a detective; that said Conan Doyle and one William Gillette, a dramatist and actor, collaborated and composed a drama in four acts, the plots, scenes, incidents and characters of which were original with said Doyle and Gillette, to which they gave the name of Sherlock Holmes; that appellee contracted with said Doyle and Gillette and acquired the exclusive right to produce, perform and represent said drama for five years from December 7, 1898, in the United States and elsewhere; that he produced the same in the principal cities of the United States at an expense of many thousands of dollars; that the receipts therefrom have been large; that the name of said

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play, to wit, "Sherlock Holmes," is of great value as a trade-mark, and that appellee has expended large sums of money in advertising said play under the trade-mark name of "Sherlock Holmes;" that appellant is the lessee and manager of Hopkins Theatre, Chicago, and has advertised and threatens to produce a play commonly known as a detective play at said Hopkins Theatre, under the name "Sherlock Holmes, Detective," and that "in order to secure to itself the fame and benefit of appellee's said drama and trade-mark and in order to deceive the public and make the said play so advertised by the defendant as aforesaid appear to be the play of your orator, to wit, the drama of 'Sherlock Holmes' collaborated by A. Conan Doyle and William Gillette, is wrongfully and fraudulently using your orator's said trade-mark, without the consent of your orator."

Appellant filed a general demurrer to the bill, which on hearing was overruled. Appellant elected to stand by its demurrer, whereupon the court entered its decree finding "that the allegations of said complainant's bill herein are true" and granting appellee relief as prayed.

The errors assigned are that the court erred in granting an injunction, in overruling the demurrer, and in failing to dissolve the injunction and dismiss the bill.

ADOLPH MARKS, attorney for appellant.

THOMAS S. HOGAN, attorney for appellee.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

Appellant's principal contention is that "the bill of complaint does not set up a case recognizable by any court, where, as here, it is sought to maintain an alleged trade-mark right, based on common law rights, for a literary production, wholly unconnected and disassociated from merchandise or mercantile business." It seems to be assumed that a trade-mark right can not be maintained except where the trade-mark is applied to articles of merchandise to indicate "ownership and origin, and carry with it a guaranty of character and quality." The right to protection is

not thus limited. The names of publications, arbitrarily selected, may be and frequently have been protected as trade-marks. In *Robertson v. Berry*, 50 Md. 591-596, it is said: "A publisher or author has, either in the title of his work or in the application of his name to the work, or in the particular marks which designate it, a species of property similar to that which a trader has in his trade-mark, and may, like a trader, claim the protection of a court of equity against such a use or imitation of the name, marks or designation as is likely in the opinion of the court to be a cause of damages to him in respect of that property." In the case at bar the drama entitled "*Sherlock Holmes*" has not been copy-righted. Its authors, and appellee as their grantee, are nevertheless entitled to protection against unlawful invasion of their rights. It is said by Justice Clifford in *McLean v. Fleming*, 96 U. S. 245-252, "the court proceeds on the grounds that the complainant has a valuable interest in the good will of his trade or business, and having adopted a particular label, sign or trade-mark indicating to his customers that the article bearing it is made or sold by him or by his authority, or that he carries on business at a particular place, he is entitled to protection against one who attempts to deprive him of his trade or customers by using such labels, signs or trade-mark without his knowledge or consent."

In the case before us it appears that appellee is the owner, by contract with the authors, of the exclusive right to produce the play based upon a character created in a book by A. Conan Doyle, the play having been prepared by said Doyle in connection with one Gillette, a dramatist and actor, and that they adopted the name "*Sherlock Holmes*" for said drama as their trade-mark to distinguish it from all other productions, plays or dramas. This play has been performed in many places and the receipts from its performance have been large. The bill asserts and the demurrer admits, the adoption of the name "*Sherlock Holmes, Detective*," is an effort on the part of appellant to obtain some advantage from the advertising done by appellee and the reputation acquired for the original play by its success-

ful production. One seeing appellant's advertisement of a play entitled "Sherlock Holmes, Detective," would naturally suppose, unless particularly advised to the contrary, that it is the same play containing the same character described in Doyle's book and in the dramatization advertised and produced by appellee. If, as the bill asserts, the play advertised by appellant under the name "Sherlock Holmes, Detective," is inferior to the original, it is apparent that the latter may suffer in reputation by the production of an inferior play under a name so closely identified with that produced by appellee.

It is alleged in the bill that appellant is attempting to deceive the public by the production of its play under the name of the original character. As said in *Matsell v. Flanagan*, 2 Abb. N. S. 459, "the enforcement of the doctrine that trade-marks shall not be simulated does not depend entirely upon the alleged invasion of individual rights, but as well upon the broad principle that the public are entitled to protection from the use of previously appropriated names or symbols in such a manner as may deceive them by inducing or leading to the purchase of one thing for another." It is apparent that whether such was the intention or not, the name used by appellant is well calculated to deceive the public and give the impression that appellants are producing the original drama known as Sherlock Holmes. Equity will restrain such unauthorized use of a trade-mark. *Taylor v. Carpenter*, 11 Paige, 292; *Hennessy v. Wheeler*, 69 N. Y. 271; *Walton v. Crowley*, 3 Blatch. 440.

As the owner of "the exclusive right to produce, perform and represent said drama under the title 'Sherlock Holmes'" in the United States, appellee is entitled to maintain the bill. Objection is made that the decree does not find any facts. It finds that the allegations of the bill are true. Appellant did not answer but stood on his general demurrer, thus admitting all facts well pleaded. *Harris v. Cornell*, 80 Ill. 54-62. The bill is properly verified, and its material averments justify the decree.

Finding no error in the record the decree of the Circuit Court is affirmed.

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1. **EXECUTION SALE—*Terms of Sheriff's Sale.***—The terms of a sheriff's sale can not be other than for cash in hand. When the sheriff is notified that the bidder will not comply with his bid, he has a right to treat the matter as no sale and sell again; he is not obliged to make out and tender a certificate of sale, wait for his money or attempt to collect it in such way as he can.

2. **SAME—*Sheriff May Hold Purchaser to His Bid.***—The sheriff may hold the purchaser to his bid, and thus make himself responsible to the creditor for the amount of the sale, and be bound to pay the sum at once, but he is under no obligation to do this; he may, upon the mere failure of the bidder to pay, re-advertise and sell.

3. **SAME—*Waiver by Sheriff of Payment by Bidder.***—The sheriff, by receiving from the bidder the costs of re-advertising, and agreeing so to do, waives any right he has to compel a payment to him, and assents to the attempted sale being treated as naught.

Mandamus.—Error to the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Affirmed. Opinion filed October 24, 1902.

J. B. HUTCHINSON, JAMES E. DAUGHTERS and ARTHUR W. BURNHAM, attorneys for plaintiff in error; YOUNG, MAKEEL, BRADLEY & FRANK, of counsel.

ALDEN, LATHAM & YOUNG, attorneys for defendant in error.

MR. JUSTICE WATERMAN delivered the opinion of the court.

In this contest between judgment creditors of one Crocker it appears that three judgments were obtained against Crocker; Bradley's, plaintiff in error, being last obtained.

This writ is prosecuted from a judgment awarding a peremptory writ of mandamus against the sheriff of Cook county, commanding him to advertise and sell certain real property. The appeal is by a judgment creditor who intervened in the court below, claiming that there had already been a sale under execution of the said real property, and that the execution delivered to the sheriff was by reason

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of such sale *functus officio*. The sheriff has not appealed from the order awarding the mandamus nor does he complain of it.

The petition for the writ of mandamus sets forth the following: That the petitioner, who is the defendant in error, May 15, 1899, obtained a judgment against one James R. Crocker for \$1,090.30, and that May 16, 1899, an execution was issued on said judgment and placed in the hands of the sheriff of Cook county for service; that August 14, 1899, this execution was returned by said sheriff "no property found and no part satisfied;" that October 13, 1895, one Francis S. Hall obtained a judgment against said James R. Crocker for \$400, and April 10, 1899, had an alias writ of execution issued and placed in the hands of the sheriff of Cook county, who levied this writ on certain real estate described in the petition; that the real estate was duly advertised for sale, and May 9, 1899, was sold to said Francis S. Hall; that the judgment debtor, James R. Crocker, did not redeem said property from said sale; that August 2, 1900, which was fourteen months and twenty-four days after said sale under the execution issued on the judgment in favor of said Francis S. Hall, petitioner had an alias writ of execution issued on its said judgment and placed in the hands of Ernest J. Magerstadt, sheriff of Cook county, for service, and paid to said sheriff the amount for which certain of the lots were sold under said Hall's execution, with interest and costs, as provided by law, and thereby redeemed from said sheriff's sale under said Hall execution, a certain part of said property which is described in the petition, and that said sheriff advertised said property so redeemed for sale for August 28, 1900, at 10 o'clock A. M.; that on said last mentioned date, Hobert P. Young, representing the petitioner, who was the judgment creditor, attended said sale and bid in the property in the name of one W. C. Ruckman, for \$205; that immediately after said bid was made, said Hobert P. Young notified said sheriff that said W. C. Ruckman would not comply with the terms of his bid and would not pay said \$205 or any

part thereof; and that he would refuse to accept a certificate of purchase of said property; and thereupon said Hobert P. Young, representing the petitioner, requested the sheriff to re-advertise said property for sale, and the sheriff stated he would do so, and requested said Hobert P. Young to pay him \$4 as the costs of re-advertising, and thereupon the said Hobert P. Young paid to the sheriff said sum of \$4 to cover the costs of re-advertising said property for sale; that a short time thereafter the sheriff notified said Hobert P. Young that he would not re-advertise said property for sale under said alias writ of execution; that the sheriff, though often requested since to re-advertise and offer for sale and sell said property, refused so to do; that said W. C. Ruckman did not comply with the terms of his bid, nor did he pay to the sheriff the amount of his bid or any part thereof, nor was a certificate of purchase of said premises tendered or delivered by said sheriff to said W. C. Ruckman, or to any one in his behalf, but to pay the amount of his said bid or any part thereof, or to receive a certificate of purchase or in any way to comply with the terms of his said bid said Ruckman wholly and absolutely refused to do.

Thomas E. D. Bradley, plaintiff in error, intervened and answered the petition, setting forth that the bid of said Ruckman by Young was accepted by the sheriff and the property thereunder struck off to and declared by the sheriff sold to said Ruckman, and a written memorandum was made by the sheriff to that effect; that thereby he, Bradley, became entitled to redeem from said sale so made by the sheriff to petitioner, August 28, 1900.

Bradley, intervenor below and plaintiff in error here, in his answer, denied that said Hobert P. Young, immediately after he made said bid of \$205, notified the sheriff that Ruckman would not comply with the terms of said bid, but answered that he believes it to be true that some time after said sale, as aforesaid, and long after the time when said sheriff had declared said premises sold to said petitioner upon the bid of said Young of \$205, and after he, Bradley,

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had made known to the sheriff that he desired to redeem from said sale, the petitioner refused to accept the redemption money deposited with said sheriff by defendant to redeem from the sale to petitioner on August 28, 1900; but defendant is advised that such neglect and refusal of petitioner is ineffectual to defeat defendant's right to redeem from said sale, or to prevent said sale from having full force and effect. In an amended answer, Bradley says that immediately after said bid and sale was made to said Ruckman, he, Hobert P. Young, notified the sheriff that said bid would not be complied with, and that a certificate of sale of said premises at said sale would be refused if tendered.

Defendant admits, as alleged in the petition, that he secured a judgment against said Crocker; that execution was issued thereon and that the sheriff advertised the premises for sale on said execution on November 27, 1900, as alleged in said petition.

Bradley, defendant in error, further says that October 26, 1900, he paid to said sheriff for the purpose of redeeming from the said sale of August 28, 1900, by said sheriff, under the petitioner's execution, the sum of \$223.30, said sum being the amount necessary to redeem from said sale pursuant to the statute in such case made and provided, and said sheriff, pursuant to said statute, by virtue of defendant's redemption from said sheriff's sale of August 28, 1900, accepted from this defendant for the purpose of redemption as aforesaid, the said sum of \$223.30 as redemption money from said sale of August 28, 1900, and thereupon, October 26, 1900, said sheriff made, and thereafter, November 2, 1900, filed in the office of the recorder of said Cook county, in due form of and according to law, a certificate of such redemption by this defendant, and said certificate of redemption was duly recorded in book 7085 of records, at page 296.

A demurrer to the second amended answer of the intervenor having been sustained, judgment was entered against the sheriff.

So far as mere words could do so, and perhaps so far as a mere written memorandum could make effectual what took place August 28, 1900, there was a sale by the sheriff to Ruckman. Actually there was no sale. The terms of the attempted sale could not be and were not other than for cash in hand. When Young notified the sheriff that Ruckman would not comply with his bid, pay money or receive a certificate of sale, the sheriff had a right to treat the matter as no sale and sell again; he was not obliged to make out and tender a certificate of sale, wait for his money or attempt to collect it in such way as he could. *Herdman v. Cooper*, 138 Ill. 583; *Slater v. Lamb*, 150 Mass. 239; *Maher v. Aetna Life Ins. Co.*, 116 Ind. 486; *Humphrey v. McGill*, 59 Ga. 649.

He might have held Ruckman to his bid, and thus made himself responsible to the creditor for the amount of the sale and been bound to pay such sum at once. He was under no obligation to do this. He might, upon the mere failure of the bidder to pay, have re-advertised and sold. *Murfree on Sheriffs*, Sec. 997; *Hermann on The Law of Executions*, Sec. 211; *Freeman on Executions*, Sec. 301.

This is not a case where there has been a delivery of the property to the purchaser and therefore the sheriff is chargeable with the purchase price. See *Disston v. Strauck*, 42 N. J. Law, 546; *Robinson v. Brennan*, 90 N. Y. 208. There has been no delivery, but a consent to treat the matter as no sale, which, payment not being made, the sheriff could have done without the consent of the bidder.

The sheriff, by receiving \$4 from the bidder as the costs of re-advertising, and agreeing so to do, waived any right he had to compel a payment to him and assented to the attempted sale being treated as naught. There having been only an attempt to sell, there could be no redemption from such attempt and the sheriff could not, after his acquiescence in the refusal of Ruckman to comply with his bid, re-vivify the attempted sale, by acceptance of redemption money from another judgment creditor. Having received the costs of a new advertisement and agreed to re-advertise, it became

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his duty so to do, as requested by the plaintiff in the execution.

It is not contended that the sheriff has refused to return to plaintiff in error the money paid by him to redeem; nor that the sum so paid has been put beyond his reach.

The position of plaintiff in error is not that he fears that upon a re-sale a less amount will be bid, but, as he frankly says, his apprehension is that more will be bid and he consequently have to pay more if he redeem.

The application for a mandamus was properly made and the plaintiff in error properly allowed to intervene therein as a defendant.

The judgment of the Superior Court is affirmed.

John Scheidt v. Herman Goldsmith.

1. **BANKRUPTCY**—*Status of Bankrupt Before Discharge*.—A bankrupt before his discharge is, as to his estate, *civiliter mortuus*, and being *civiliter mortuus* he can not commence or prosecute a suit, and can only be represented by the assignee.

Assumpsit.—Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Reversed and remanded. Opinion filed October 24, 1902.

Appellee, December 31, 1898, filed his petition in bankruptcy and was duly adjudged a bankrupt; he was not discharged until June 12, 1899. While thus a bankrupt, he, March 9, 1899, commenced suit before a justice of the peace in Cook county, against appellant. Having, April 13, 1899, before such justice, obtained therein a judgment for \$200 against appellant, the latter took an appeal to the Circuit Court. November 8, 1899, by order of Judge Hanecy, this cause was placed at the foot of the docket to be called upon Judge Hanecy's next special calendar.

Appellant's attorneys, thereafter, kept watch as to such special calendar, but it was not called. May 24, 1901,

Judge Hanecy was calling another calendar upon which this case, unknown to appellant's attorneys, was, and this cause was on said day, in the absence, and without notice or knowledge by them, called by Judge Hanecy and the appeal taken by appellant was dismissed.

Appellant's attorneys first learned of such dismissal June 1, 1901, and at once gave notice and moved to set aside the order of dismissal. Upon the hearing of this motion the foregoing was made to appear and also that in said bankruptcy proceedings of appellee no permission to him to prosecute this suit against appellant was given nor was the claim of appellee upon which this suit is based scheduled.

The court, the term at which said dismissal was had having passed, refused to set aside the said judgment dismissing appellant's appeal.

EDDY, HALEY & MUNROE, attorneys for appellant.

FRANCIS A. McDONNELL, attorney for appellee.

MR. JUSTICE WATERMAN delivered the opinion of the court.

A bankrupt before his discharge is, as to his estate, *civiliter mortuus*. Bump on Bankruptcy, Eleventh Ed., 337; Lacy, Terrid & Co. v. Rockett, 11 Ala. 1002; Barron v. Newberry, 1 Bissell, 149; Cannon v. Wellford, 22 Grattan, 195; Abernathy v. Phillips, 82 Va. 769-772.

If, as is urged by appellee, his bankrupt estate was not equal to the exemptions allowed to him by the bankrupt law, such fact might have been made to appear to the Circuit Court. Nothing of the kind was shown, while it did appear that his claim against appellant was not scheduled.

We do not understand how appellee can claim as exempt, property not scheduled, and consequently a thing concerning which the bankrupt court can not be presumed to have made an order of exemption.

Being *civiliter mortuus*, appellee could not commence or prosecute his suit against appellant, and had such fact been made known to the court the suit would have been dis-

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missed. The court should have set aside the order dismissing the appeal. Such error of fact could at common law have been reached by writ of *coram nobis*.

The order of the Circuit Court refusing to set aside its order of dismissal must be reversed and the cause remanded.

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1. EVIDENCE—*Admissions in Litigation Involving the Same Subject-matter and Parties*.—The duly authenticated transcript of the proceedings and decree containing admissions made in a contested litigation involving the same subject-matter as the suit at bar, and between the same parties, is entitled to full faith and credit here, and is properly admitted in evidence.

2. SAME—*Admissions Made in Bill in Chancery*.—The admission of a fact by a party to a suit, is competent evidence, no matter how made; and where the statement or declaration of a party is made in a bill in chancery, that bill is competent evidence to be considered by the jury, who are to determine the weight to be given to the evidence.

3. SAME—*Admissions of One of Several Joint Parties*.—Where the parties have a joint interest in the matter in suit an admission by one is, in general, competent evidence against all.

4. CONSTRUCTION OF STATUTES—*Sec. 18, Chap. 32, R. S.*—It would be a very narrow view of the meaning and intent of the statute to arbitrarily limit the liability of officers, agents or boards of directors to that one of them to whom an order was actually given, whereby a debt was contracted, if the others were actively participating in the conduct of the business with full knowledge of what their agent was doing. In order that a debt may not be "made by them," they must not approve or direct the creation of the indebtedness or have anything whatever to do with it.

5. CORPORATIONS—*Liability of Directors Under Sec. 18 of the General Incorporation Act*.—Directors and officers liable under section 18 of the general incorporation act for debts and liabilities which are contracted by them in the name of the corporation before the certificate of complete organization has been recorded, are not relieved from such liability simply because the creditor may have dealt or contracted with them while acting as officers of a corporation *de facto*.

6. PRACTICE—*Question of Unreasonable and Vexatious Delay*.—The question as to whether there has been an "unreasonable and vexatious delay of payment" is properly submitted to the jury.

7. WORDS AND PHRASES—*What is Not an Unreasonable and Vexa-*

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tious Delay.—To appear and defend a suit merely, is not unreasonable or vexatious delay.

8. *BANKRUPTCY—Effect of Discharge of Party to Suit.*—The discharge in bankruptcy of one of the parties to a suit covering the debt in controversy has the same effect as where one of three or more obligors has died.

Attachment.—Appeal from the Circuit Court of Cook County; the Hon. EDWARD P. VAIL, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Affirmed in part and reversed in part. Opinion filed October 24, 1902.

Appellee brought this action to recover the price of coal furnished for the steamer "Puritan." It is claimed by appellants that the steamer was owned and operated by a corporation known as the "Seymour Transportation Company," claiming to be organized and existing under the laws of Illinois. It appears, however, that the certificate of incorporation was never filed for record either in the recorder's office of Cook county, where the principal office of the alleged corporation was located, or elsewhere.

The statutory provisions are as follows: "The secretary of state shall thereupon issue a certificate of the complete organization of the corporation, making a part thereof a copy of all papers filed in his office in and about the organization of the corporation and duly authenticated under his hand and seal of state, and the same shall be recorded in a book for that purpose in the office of the recorder of deeds of the county where the principal office of such company is located. Upon the recording of said copy the corporation shall be deemed fully organized and may proceed to business. Unless such company shall be organized and shall proceed to business as provided in this act within two years after the date of such license, then such license to form such association shall be deemed revoked, and all proceedings thereunder void." (Sec. 4, Chap. 32, R. S.)

"If any person or persons being or pretending to be an officer or agent, or board of directors of any stock corporation or pretended stock corporation, shall assume to exercise corporate powers or use the name of any such corporation or pretended corporation without complying with

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the provisions of this act, (or) before all stock named in the articles of incorporation shall be subscribed in good faith, then they shall be jointly and severally liable for all debts and liabilities made by them, and contracted in the name of such corporation or pretended corporation." (Idem, Sec. 18.)

C. E. KREMER, attorney for appellants.

HUBERT E. PAGE, attorney for appellee.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

The declaration charges the appellants with joint and several liability of officers and directors of a corporation. The ground of alleged liability is that they assumed to exercise corporate powers and used the name of the corporation or pretended corporation without complying with that provision of the incorporation act which requires the certificate of complete organization to be recorded in the office of the recorder of deeds. The certificate was issued May 18, 1892. The debt sued for was contracted in 1895, for coal furnished to the steamer "Puritan." It is contended by appellee that appellants are liable under the provisions of section 18 of the act referred to, because the debt was "made by them and contracted in the name of such corporation or pretended corporation."

Appellants prosecute this appeal from the judgment rendered in the Circuit Court, holding them liable for the debt. All of them were original subscribers to the capital stock of the corporation and continued to be members and stockholders during the years 1894 and 1895, and each of them was during all that time either an officer or director. It is argued in their behalf that as such officers and directors they can not be held jointly and severally liable, inasmuch as the coal was ordered by E. W. Seymour alone, and the others did not actually participate or co-operate in the purchase, nor was there on their part any affirmative voluntary act in connection therewith; citing *Lewis v. Montgomery*,

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145 Ill. 47; *Edwards v. Cleveland Dryer Co.*, 83 Ill. App. 643; *Edwards v. Dettenmaier*, 88 Ill. App. 366.

It is not disputed that the actual purchase of the coal was made by E. W. Seymour, one of the appellants, who was residing in Chicago and acting as manager of the business of the steamer at that place. The other appellants resided, at the time, in Michigan. It is claimed by appellee, however, that the debt in controversy was in fact contracted by the authority and with the assent of all the appellants. It is said also that appellee had no notice whatever that the steamer "Puritan" was then owned or operated by a corporation, and there is evidence in the record tending to support this claim. As bearing upon the question of how and by whom the steamer was owned and operated, appellee offered in evidence a record of a proceeding in the U. S. District Court for this district, in which appellants filed their petition and libel to limit liability as owners of the steamer "Puritan," particularly specifying the debt here in controversy. In that petition it is set forth that appellants were owners of the steamer "Puritan;" that it had been burned in Manistee Lake, where its remains then lay; that by reason of failure to record the certificate of complete organization, as appellants were informed and believed the "Seymour Transportation Company" had no valid existence; that the steamer had been sold in April, 1892, by John Seymour and Antoine E. Cartier to said company; that the present suit was pending, and that at the time of her loss the steamer was indebted to various persons, who threatened to bring suit against appellants. This petition purports to be signed in behalf of all of the appellants by their counsel, and is verified by the affidavit of E. W. Seymour.

We do not regard the admissions in this petition and the proceedings thereunder as estopping appellants from a denial of their personal liability in the present suit, as appellee's counsel claims. (See "*The Benefactor*," 103 U. S. 239.) But the record was, we think, admissible in evidence. The petition and libel contained admissions made

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in a contested litigation involving the same subject-matter as the suit at bar, between the same parties. That petition states that appellants were the owners of the steamer when this debt was contracted, and that they desired to limit their personal liability, by virtue of the act of Congress. (U. S. Rev. Stat., Sec. 4282, *et seq.*) Though it may be true that appellants' names were signed to the petition by their attorneys, it is verified by E. W. Seymour, and there is no claim or pretense that the other appellants were ignorant of its contents or that their names were used without authority from them. The duly authenticated transcript of the proceedings and decree in that cause is entitled to full faith and credit here, and is properly admitted in evidence. *Litch v. Clinch*, 136 Ill. 410, 423, 425. In *Wadsworth v. Duncan*, 164 Ill. 360-366, it is said: "The admission of a party to a suit, of a fact, is competent evidence no matter how made; and where the statement or declaration of a party is made in a bill in chancery, that bill is competent evidence to be considered by the jury, who are to determine the weight to be given to the evidence. The relevancy of that evidence was as to the declarations therein made as to who were the shareholders at the time. It was error not to admit the bill in evidence." In *Smith v. Henline*, 174 Ill. 184-200, it is said: "Where the parties have a joint interest in the matter in suit an admission by one is, in general, competent evidence against all." The U. S. District Court found that the steamer was "operated by petitioners, its owners," at the time the debt in controversy was created. (*The Puritan*, 94 Fed. Rep. 365.)

It is argued that the debt was not "made by them;" that it was made by E. W. Seymour as agent of a corporation *de facto*, if not *de jure*; that the other appellants had no part in the purchase of the coal. In *Edwards v. Dettenmaier*, 88 Ill. App. 366, it is said, "not taking part means not taking any part; not approving or directing the creation of the indebtedness; not having anything whatever to do with it." It would be a very narrow view of

the meaning and intent of the statute to arbitrarily limit the liability of officers, agents or boards of directors to that one of them by whom an order was actually given, whereby a debt was contracted, if the others were actively participating in the conduct of the business with full knowledge of what their agent was doing. If they ordered or authorized him to buy coal or to manage a steamer for which they knew coal had to be obtained, it is immaterial whether they knew of whom it was purchased or the exact time of the purchase. It is sufficient if they assented to the creation of the debt as individuals, officers or a board of directors. *Lewis v. Montgomery*, 145 Ill. 30-47. There is testimony tending to show that John Seymour, another of the appellants, was present several times when coal was ordered of appellee, and had himself given an order on one occasion. The latter denies this and states that he had nothing to do during 1895 with the management, operation and navigation of the steamer "Puritan" for which the coal was purchased; that E. W. Seymour purchased the coal, and that he, John Seymour, "knew nothing personally about the purchase of coal for that steamer." There is no evidence that the other defendants had any direct part in ordering the particular coal for which the debt under consideration was contracted, but it does appear that they were all interested and participating in the business of which the operation and management of the steamer "Puritan" was an important factor. E. W. Seymour managed the steamer at Chicago and the other brother in Michigan looked after financial and other matters connected with her operation, receiving "checks from the Chicago office as earnings of the vessel," which they deposited at Manistee. They "used to get letters from E. W. quite often about the business of the boat." There is evidence tending to show also that Mr. Cartier was in Chicago and elsewhere, apparently looking after the boat, and made several trips on her.

It is urged that Elwyn W. Seymour was acting as agent, not of the defendants but of the *de facto* corporation, in

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contracting the debt, and that his acts in creating a corporate indebtedness did not create any personal liability against the defendants; citing *Lewis v. Montgomery*, 145 Ill. 30-47, where it is said that the acts of one constituted by a board of directors the general financial agent of a corporation, are the acts of the corporation, "but they are not the acts of the directors unless commanded or authorized by them." But it is held in *Loverin v. McLaughlin*, 161 Ill. 417-434, that directors and officers liable under section 18 of the general incorporation act for debts and liabilities which are contracted by them in the name of the corporation before the certificate of complete organization has been recorded, are not relieved from such liability because the creditor may have dealt or contracted with them while acting as officers of a corporation *de facto*. Such, indeed, seems to be the clear meaning of the statutory provision. This suit is brought by a creditor "against individuals assuming to act as agents or officers or directors of a corporation," and when seeking to escape statutory liability, "it is the duty of such persons to prove that their principal had a legal existence and was capable in law of contracting the debt for which they are sought to be held liable. *Loverin v. McLaughlin, supra*. It is not a question as to whether there existed a *de facto* corporation. The statute assumes such existence and provides that the officers or directors shall be liable nevertheless if they "assume to exercise corporate powers or use the name of any such corporation or pretended corporation without complying with the provisions of this act."

It is urged that interest on the account has been improperly allowed. The question was submitted to the jury whether there has been an "unreasonable and vexatious delay of payment." (R. S. Chap. 74, Sec. 2.) This was proper. *Levinson v. Sands*, 74 Ill. App. 273-276; *Sanderson v. Read*, 75 Ill. App. 190-194. To appear and defend a suit merely, is not unreasonable or vexatious delay. *W. C. A. Works v. Sheer*, 104 Ill. 586. But the facts in this case were all before the jury, and we find no sufficient reason to disturb

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their finding in this respect. There was delay, and it was for the jury to say whether, under all the circumstances, it was unreasonable and vexatious.

Complaint is made of the admission of certain testimony and of the instructions. We have considered these objections and if it be conceded that some of the objections are well taken, it is nevertheless evident, we think, that such supposed errors were not harmful, and we deem it unnecessary to extend this opinion to consider them in detail.

E. W. Seymour, one of the appellants, filed a plea setting up a discharge in bankruptcy, covering, it is conceded, the debt in controversy. The discharge has the same effect as where one of three or more obligors has died. Judgment in such case may be rendered against the survivors of them. *Stevens v. Catlin*, 152 Ill. 56-58. As to him the judgment is erroneous and will be reversed. Against the other appellants it must be affirmed.

Senecca D. Kimbark v. Illinois Car & Equipment Co.

1. **CONTRACTS—Acceptance of Proposition with Modifications.**—An acceptance of a proposition with modifications constitutes in law a rejection of it, and the substitution in its place of a new proposition, which, to constitute a contract, must itself be accepted by the other party.

2. **WORDS AND PHRASES—Acceptance Defined.**—An acceptance is defined as follows: "In commerce, an engagement by the person on whom a bill of exchange is drawn to pay the bill; usually made by the person writing the word 'acceptance' across the bill and signing his name or simply writing his name across or at the end of the bill." *Century Dictionary*.

3. **EVIDENCE—Conversation over a Telephone.**—Evidence of a conversation over a telephone between the plaintiff and a person in defendant's office is inadmissible in the absence of proof of the identity of the person.

Trespass on the Case, upon promises. Appeal from the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Reversed and remanded. Opinion filed October 24, 1902.

Kimbark v. Illinois Car & Equipment Co.

Statement.—This is an action by the Illinois Car & Equipment Company, dealers in iron, for merchandise sold and delivered to appellant, to the amount of \$2,636.79. A plea of the general issue, withdrawn before the trial, and pleas of set-off, were filed. The pleas of set-off set up an alleged contract between appellee and appellant as follows:

“CHICAGO, May 22, 1899.

MR. S. D. KIMBARK, Michigan Avenue, Chicago.

DEAR SIR: We are pleased to quote you on 300 tons of bar iron, up to and including 8-in. wide, a price of \$1.60 per hundred pounds, half extras, f. o. b. Chicago, for delivery during the months of June and July. Terms sixty days acceptance, you to furnish us specifications previous to May 30th. The acceptance of this proposition will constitute contract between us.

Yours truly,
J. M. MARIS,
General Manager.”

“Accepted, with the understanding that 150 tons are to be specified for by May 30th, balance to be specified for before June 30th.

S. D. KIMBARK,
By W. B. MITCHELL.”

The pleas state a breach of the contract in that the appellee failed to deliver part of the iron, and ask damages in the sum of \$5,000. Appellant in each of the pleas of set-off alleged a full performance on his part as to the specifications for 150 tons of iron by May 30, 1899, and 150 tons by June 30, 1899, and that the appellant always stood ready and willing to accept the said goods and to give an acceptance or acceptances for the same in accordance with the contract.

It was stipulated between the parties, that the defendant, Kimbark, received from the plaintiff company iron as follows, which was all that was delivered to him by the plaintiff company:

Aug. 14, 1899,	20,125 lbs.,	at \$1.60 per cwt.....	\$ 322.00
“ “ “	40,010 “ “	1.70 “ “	680.17
“ “ “	34,760 “ “	1.60 “ “	556.16
Sept. 6, “	66,300 “ “	1.60-1.65 per cwt...	1,078.46

It is also agreed that the price charged therefor amounted in all to two thousand six hundred thirty-six and 79-100 dollars (\$2,636.79); that this charge is correct; that no part of said price or amount has been paid, and that the iron was delivered to the defendant, Kimbark, without demand or request for any promissory note, bill of exchange or acceptance at the time of such delivery, and that the defendant, Kimbark, has not offered or given the plaintiff company any such note, bill of exchange or acceptance. The amount of iron actually delivered at any time as above stated amounted in the aggregate to a fraction over eighty tons.

It appears that the first negotiations between the parties took place early in 1899, when one Johnston, a clerk in the employ of a broker dealing in iron, had some conversation with appellant's agent relating to the sale of iron by the appellee, resulting in the delivery to appellant's agent of the written proposition signed by appellee, which constitutes the first part of the alleged contract as above set forth. Objection having been made by appellant's agent to that clause in the proposition requiring the specifications for the whole 300 tons to be furnished previous to May 30th, Johnston testifies that he called up appellee's office by telephone, and received, as he supposed, authority to allow appellant to extend the time in which appellant was required to furnish specifications for half of the iron from May 30th to June 30th. This modification was accordingly included in the written acceptance of the proposition appended thereto, and signed in duplicate, in appellant's name, by his agent. One copy was retained by appellant and the other delivered at appellee's office.

Appellant claims to have furnished the specifications for 150 tons of the iron during the month of May, and he subsequently sent in specifications for the remainder of the 300 tons and more, during the month of June. When the June specifications were sent in, appellee, claiming that its attention had not before been called to the modified acceptance of appellant and that it had never authorized

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or assented thereto, wrote the latter, refusing to fill June orders, and stating that appellant was not entitled to any iron except such as had been specified in May, according to appellee's original proposition. Meanwhile the price of iron had risen "from \$1.60 per hundred pounds" to \$1.85 or \$1.90, and according to some of the testimony it went up as high as \$2.90 in September and October following.

None of the 150 tons of iron alleged to have been specified for in May, was delivered by appellee during the months of June and July as provided in the original proposition, but as shown by the stipulation above referred to, the eighty tons and over, which was delivered, was furnished in August and September following. Payment for this was not requested until on or about September 30th, when a bill was sent to appellant charging for the iron so delivered at the price provided in the original written proposition.

Appellant claims that his modified acceptance of appellee's original proposition was assented to and acted upon by appellee and constituted a contract, in accordance with which appellee was bound to furnish him the whole three hundred tons of iron, on the June as well as the May specifications. He refused, therefore, to pay for the iron, over eighty tons of which had been delivered to him, and claims that he was damaged in a sum larger than the amount due appellee for what he had received, by appellee's failure to deliver the whole 300 tons. When the controversy over payment of that bill arose, a car load of iron had been shipped by appellee to appellant which, however, was then stopped in transit, and has never been delivered.

The court instructed the jury that unless they allowed appellant's claim of set-off, their verdict should be for \$2,322.54 in favor of appellee. They returned a verdict, however, for \$2,162.54, upon which judgment was entered, from which this appeal is prosecuted. Appellant insists the amount of the verdict discloses that the jury found the issues in his favor and allowed his claim of set-off, but that in obedience to instructions claimed to be erroneous, he was allowed a sum much less than he is entitled to recover.

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BLEWETT LEE, attorney for appellant.

MCCORDIC & SHERIFF, attorneys for appellee.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

It is first insisted by appellant's attorney that the writing consisting of appellee's written proposition of May 22, 1899, and appellant's modified acceptance thereof, constituted a contract binding upon the parties. This appellee denies. Appellant's acceptance was coupled with a modification whereby he sought to obtain thirty days additional time, from May 30th to June 30th, in which to specify for half of the 300 tons of iron; and this condition offered a new and counter proposition, which, in order to constitute a contract, required to be in its turn accepted by appellee. The rule is stated in *Anglo Am. Prov. Co. v. Prentiss*, 157 Ill. 506-514, as follows: "An acceptance of a proposition with modifications, constitutes in law a rejection of it, and the substitution in its place of a new proposition, which, to constitute a contract, must itself be accepted by the other party." That there was ever in this case any express acceptance of appellant's modification by appellee is not asserted. It is, however, urged by appellant's counsel that acceptance must be implied from appellee's conduct, and that the evidence warranted the jury in so finding.

The evidence chiefly relied upon to sustain appellant's claim that appellee accepted the modification, and that it became thereby a contract and binding upon the parties, is, first, a telephone conversation alleged to have taken place between one Johnston, a clerk in the employ of appellee's broker, who had been sent to appellant with appellee's original proposition of May 22, 1899; second, the retention by appellee of the writing as modified, without objection, for seventeen days after it was returned, and until appellant's June specification began to come in and the market price of the iron had gone up; third, recognition of the instrument as a "contract" in appellee's correspondence, and a partial compliance therewith by delivery of a part of the iron to appellant at the contract price.

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The telephone conversation was introduced for the purpose of showing authority from appellee to its alleged agent to consent in its behalf to the modification before it was made. The testimony of Johnston tends to show that he was sent by the broker who employed him, with appellee's letter of May 22d, to appellant's office; that he was told by Kimbark's representative that the clause requiring the whole 300 tons to be specified "previous to May 30th" was unsatisfactory; that he then called up appellee's office by telephone and asked for Mr. Maris, appellee's general manager; that Mr. Maris came, as he supposed, to the 'phone, and Johnston reported Kimbark's objection, and that the latter desired to specify half the iron at once, and to have until June 30th to specify the remainder; that he was asked in reply if Kimbark could give the specifications for the last half by June 15th, to which Johnston answered he could not say, but would try; that the speaker at the other end of the 'phone then said, "Do the best you can with it, Mr. Johnston;" and that the contract was then accepted and signed by Kimbark, with the modification in question. Johnston did not know Mr. Maris' voice. He did not, therefore, and does not know whether this telephone conversation was in fact held with the latter or not. This evidence is of no value, therefore, as proof of authority to Johnston to consent to the modification made by Kimbark, in the absence of any proof that the person with whom he claims to have talked over the telephone wire had authority to act for appellee. This testimony was admitted in evidence over appellee's objection. It may be conceded to be as admissible as would be a similar conversation held with an unknown clerk at appellee's place of business. It merely tends to show that such a conversation was held with some one at appellee's office. As tending to show, however, that the speaker at the other end of the telephone was Mr. Maris, as Johnston supposed he was, we regard the evidence as inadmissible in accordance with the views expressed in *J. Obermann Brew. Co. v. Adams*, 35 Ill. App. 540. It may be said, however, that if the conversation be

deemed competent, it discloses no express authority to Johnston to consent to Kimbark's modification. "Do the best you can Mr. Johnston," is at most ambiguous, and falls far short of authorizing acceptance of a new proposition. It may mean as well, "Do the best you can to secure acceptance of the written proposition as submitted." Mr. Maris denies that he had any such conversation with Johnston over the telephone or otherwise, and states that he left his office about half past two or three o'clock that afternoon and left the city that evening, and that he had no intimation of any modification in his original proposition until his return, about June 10th.

It is urged, in the second place, the fact that appellee retained the modified contract for seventeen days after it was returned, and until June 9th, without objection to Kimbark's counter proposition, is evidence of acceptance by appellee. There is evidence tending to show that appellee's broker, to whom Johnston returned the paper after its modification and execution by Kimbark, discovered the modification the next day, May 23d. It does not appear that the broker had authority to consent to any change in the written proposition, or to do more than present it to Kimbark and return it to appellee when accepted or rejected. He did take a copy of it back to appellee's office and delivered it to some one of appellee's employes, but to whom he does not remember. So far as appears he did not call any one's attention to the proposed modification. Orders for the iron, duly specified, began to come in from appellant immediately. Twelve such orders, covering, according to appellant's claim, about 150 tons of the iron, were sent in during the remainder of the month of May, and received by appellee without objection. It was when June specifications first began to go in that appellee first objected to the modification. Upon that date, June 9th, the price of the iron having meantime materially gone up, appellee acknowledged the receipt of an order of June 6th as follows: "We have your order of June 6th for two bars of $2 \times 1\frac{1}{2}$ iron, but will be unable to include this in our order, as according to our contract

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with you we do not accept any orders after June 1st." The letter concludes with a statement that the time of delivery of the iron previously ordered was dependent upon the mill, but that appellee would try to get it as soon as possible. June 12th appellee reiterated its refusal to accept June orders and wrote as follows: "In looking up the contract which was signed by Mr. J. M. Maris, our general manager, on May 22d, I find that you made an addition to it after being signed by Mr. Maris, that '150 tons were to be specified by May 30th, and the balance before June 30th.' This was never confirmed by us, and of course we decline to accept any such modification of the original proposition. With this in mind, we decline to accept any order that you have sent or may send after May 30th." To this Kimbark, the next day, replied: "On examination of our contract you will note that 150 tons are to be specified in May, the balance before June 30th. Therefore ask you to go ahead on the specifications we have sent you. Will send you additional specifications during the month." The positions thus taken appear to have been consistently maintained thereafter by both parties. There was considerable correspondence, the tenor of which is sufficiently indicated by two or three extracts. June 23d appellee wrote returning appellant's June specifications, and saying: "According to our interpretation of the contract to furnish you bar iron, you have specified for all that was due you." June 26th appellee again writes as follows: "The additional clause which was added to your acceptance of the original contract was never confirmed by us and was repudiated as soon as discovered." Appellant replied the same date: "Before placing contract with your representative we arranged for part of the specifications to be furnished in June. It is now too late to bring up this question, and we must insist upon you filling the whole order." To this letter appellee replied in part as follows, under date of June 27th: "Our proposition to you was made with reference to your furnishing the specifications in May, and we had no idea or notion of giving you any further time; in fact it would be

impossible for us to have made such a contract and we can not furnish you the iron on any such understanding. We herewith return specifications." The specifications so returned were June specifications. The rest of the correspondence relates chiefly to shipment of the May orders. July 3d Kimbark wrote threatening to buy elsewhere, "and charge you with the difference in price," if some of the iron ordered was not more promptly shipped. Whether appellant's proposed modification was discovered at all by any one in appellant's office until the June specifications began to come in, or until the return of the general manager, does not definitely appear from the evidence. Apparently it was not. It is true that Kimbark's May specifications had been coming in, but if appellee was meanwhile under the impression that Kimbark had accepted its proposition of May 22d unconditionally, the receipt of these May orders would not call attention to any proposed modification. Mr. Maris, appellee's general manager, states that he knew nothing of Kimbark's counter proposition until his return from the south about June 10th, and that he then immediately notified appellant by telephone and letter that it was rejected.

The retention of the paper after its return from Kimbark, appellee meanwhile supposing that Kimbark had accepted the original proposition, and ignorant of the fact that instead he had inserted therein a counter proposition, would not indicate an intention to accept such counter proposition. It was at once rejected, as soon as appellant sent in his first June specifications. So far as appears, the receipt of these June specifications was the first intimation to appellee of Kimbark's proposed modification of the original instrument. Appellant seeks to establish affirmatively his right to set-off, on the alleged ground that there was an implied acceptance of his counter proposition. To do this the burden is on him to make proof of facts from which appellee's acceptance can be reasonably implied. The paper containing the proposed modification was retained, so far as appears, without examination by appellee, and without objection for seventeen days, during which time,

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however, nothing had apparently occurred to call attention to the change proposed by Kimbark. This does not necessarily imply an intention to accept such change. To raise such an implication it must appear that appellee knew or had some sufficient reason to put it on inquiry to ascertain that the paper contained a counter proposition which appellant supposed had been accepted, and was acting upon. There is no evidence to that effect. The acceptance and subsequent fulfillment of the May orders implied, under the circumstances, no intention to accept orders to be specified in June. As to the June specifications appellee was not silent. It repudiated them at once, as soon as they were sent in. Appellee had the right to pay no attention to appellant's counter proposition if it chose so to do; and upon being advised of its existence, might have treated it as a refusal of the original offer and dropped the whole matter. Had it done so, no acceptance could be predicated upon its inaction. Delay in giving a reply could not of itself create a contract out of a mere proposal. Appellee had the right to refuse to reply at all. Only a positive act of acceptance, or an act clearly implying acceptance could develop a mere counter proposition into a contract obligation, and no such act is in evidence. No acceptance of the counter proposition can be predicated upon appellee's acceptance of May orders in ignorance of the counter proposition, and believing such orders to be sent pursuant to the original offer. It is true that appellee had the paper in its possession and might have known by examining it what the real facts were. But it must also be said that without any intimation that it contained a counter proposition there was no apparent reason for examining it. If the original offer was accepted appellee had nothing to do thereunder but wait for Kimbark's specifications to come in. They did come in, and containing no intimation of any modification, were accepted and treated as in accord with the original proposition for iron to be specified in May only. Appellee went ahead and undertook in apparent good faith to fill these May

orders for appellant, which it had thus accepted, although it had been under none but an imaginary obligation to accept them in the first instance, after Kimbark's refusal of the offer as originally made.

We are referred by appellant's counsel to *Tilt v. LaSalle Silk Mfg. Co.*, 5 Daly (N. Y.) 19, and *Robertson v. Tapley*, 48 Mo. App. 239. The first of these was a case where a proposed contract was approved by the second party with a modification appended that inability to deliver the goods mentioned in the contract within the time therein specified should not be made a pretext for refusing to receive them upon arrival. The contract with the appended modification was returned to the office of the party of the first part and left there. Subsequently the said first party did receive and pay for some of the goods without objection, after the date specified for delivery in the original form of the contract. It was held that this was "a circumstance fully warranting the finding of the judge that the defendants had assented to the modification made by the plaintiffs." In *Robertson v. Tapley* an additional clause was inserted by the plaintiff after the contract had been signed by the defendant. One of the originals containing such addition was mailed to the defendant. The court said: "A proposition becomes a contract only when the party receiving it communicates, either actually or constructively, his acceptance to the other contracting party. Express notice of acceptance is dispensed with, when apparently not contemplated; but in such case the acceptance must be clearly manifested by some other act. The burden of showing this is on the party seeking to obtain the benefits of the contract." It was held that the admission of the defendant that he had received the amended instrument through the mails, authorized the jury to draw the inference that he had read it, and furnished sufficient evidence of acceptance to carry the question of the jury, and that "the defendant's subsequent conduct in treating the plaintiff as a sub-contractor was evidence of acceptance on his part." In neither of these cases is it suggested that the mere retention of the

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modified instrument was evidence of acceptance of the modification. In each case in the absence of express notice of acceptance, it was thought to "be clearly manifested by some other act." In the one case payment was made for goods accepted in accordance with the modification, and in the other, receipt of the modified instrument through the mails, and subsequent conduct in affirmance of the modified contract were regarded as evidence of acceptance. The evidence in the case at bar, however, does not warrant such a conclusion.

It is urged in the third place that appellee indicated its acceptance of the modification by recognizing the paper as a contract in its correspondence, and by delivering some iron, after the modification had been called to its attention. Reference is made to the letter of June 23d, already quoted in part, wherein appellee speaks of "our interpretation of the contract to furnish you bar iron." There seems to be no doubt that appellee did regard itself as bound to accept appellee's orders for such iron as was specified in May under its original proposition. In this it was mistaken, since that proposition was not accepted by appellant, and there was no such contract as appellee had originally proposed. It can not, however, be presumed that appellee, in the letter referred to, intended to express its recognition of the modified instrument as a contract between the parties, for in the same correspondence it was expressly repudiating such recognition in express terms.

Nor can the shipment and delivery of part of the iron called for by appellant's May specifications be regarded under the circumstances in evidence as proof of an acceptance by appellee of the terms of the counter proposition. Appellant was expressly notified June 9th, and before any such shipments were made, that appellee would not accept orders for iron specified after June 1st; that it declined to accept "any order that you have sent or may send us after May 30th." There is no room, therefore, for any implication by reason of appellant's shipment of iron ordered in May, that it was done in compliance with the modified or

counter proposition. It was expressly stated not to be so done.

The same is true as to the charge of the contract price for the iron ordered in May and in part delivered. It was done after and with an express repudiation of the counter proposition and can not be construed as evidence of appellee's acceptance thereof. It tends to show that the May orders were accepted upon the terms of the original offer.

There having been, therefore, no acceptance by either party of the written proposition made by each respectively, no written contract existed between them. There was, however, a contract of purchase and sale subsequently created by appellee's acceptance of Kimbark's May orders and specifications, followed by partial delivery, and Kimbark's acceptance of iron so delivered with full knowledge that it was not delivered under his counter proposition; and the question to be determined is, what are the rights and obligations thereunder, of the respective parties.

The failure to examine the paper containing the original proposition, after it was returned from Kimbark, may have been unbusiness-like, but can be accounted for in part by the absence of the general manager who had submitted the original proposition, and by the fact that the May specifications sent in by Kimbark were in no respect different, unless in quantity, from what they would have been had he accepted that proposition unconditionally. Kimbark's proposed modification did not affect the terms or conditions upon which appellee had offered him the iron if specified in May. It sought appellee's consent that a part of the iron offered might be specified in June; but it made no change in the terms of the original proposition for May orders, except as to quantity. Without waiting to ascertain whether this condition would be accepted, Kimbark at once went ahead sending in May orders, about which there was no dispute or difference, and appellee accepted them, although not obliged to do so. Both Kimbark's orders and appellee's acceptances were sent and received upon the terms and conditions stated in the written instrument, one

party apparently having in mind only the original proposition, while the other had in mind the original proposition as to half the iron and the counter proposition as to the remaining half. Nevertheless appellant accepted the iron which was delivered, after he knew that appellee had repudiated the counter proposition and was intending to deliver only such iron as had been ordered and specified in May. He insisted, as he does now, that appellee ought to accept and comply with his counter proposition, but he knew that appellee had refused and did not intend to do anything of the kind, and was delivering iron in fulfillment of the May orders only. In accepting it, appellant accepted the terms upon which it was delivered, viz., in fulfillment of May orders only. The new contract, therefore, between the parties, was in effect a purchase and sale of so much iron as appellant ordered and specified in May, upon the terms and conditions of appellee's original proposition, and as to that iron, the rights and obligations of the parties must be determined by that proposition.

It has been argued in behalf of appellant, and an instruction was given to the same effect, that the refusal of appellee, June 9th and thereafter, to accept June specifications and deliver the iron in accordance therewith, was a repudiation of a contract; citing *Kadish v. Young*, 108 Ill. 170-183; *Roebeling's Sons Co. v. Lock Stitch Fence Co.*, 130 Ill. 660; *L. S. & M. S. Ry. Co. v. Richards*, 152 Ill. 59, and others. These cases are to the effect that one party to a contract can not, by giving notice of his intention not to perform, create a breach and compel the other party to rescind before the time fixed for final performance, and so relieve himself from damages which his failure to perform may inflict upon the other party after such notice and before the time fixed for performance by the terms of the contract. This presupposes the existence of such a contract. But in the case before us there was no meeting of the minds of the parties upon appellant's counter proposition for June orders, and no contract obliging appellee to accept June specifications.

It remains to consider different views advanced by coun-

sel as to the meaning of certain expressions used in the original proposition, by which proposition, as we have said, the rights and obligations of the parties with reference to the sale and purchase of the May iron must be determined. By the terms of that proposition the iron so sold was to be delivered by the end of July. None of it was so delivered. By the acceptance, without objection, of so much of it as was subsequently delivered, appellant waived objection on that ground as to the iron so delivered. Whatever damage he suffered by appellee's failure to deliver the remainder of the May orders, was incurred at that date, July 31st. The measure of damages, if any, is the difference between the market price, August 1st, of the iron undelivered, and the contract price. If after that date appellee continued to promise delivery, and appellant acquiesced, relying on such promises, the date of appellee's final refusal might become the time at which appellant's damages should be estimated. *Summers v. Hibbard*, 153 Ill. 102-111. This depends on the facts, and is to be determined from the evidence.

The terms of payment as specified in the original offer, expressing the contract governing the May orders, are stated therein to be "sixty days acceptance." An acceptance is defined (*Century Dictionary*) as follows: "In commerce, an engagement by the person on whom a bill of exchange is drawn to pay the bill; usually made by the person writing the word 'acceptance' across the bill and signing his name or simply writing his name across or at the end of the bill." There is, perhaps, some ambiguity as to whether an acceptance in this case was to be given for each delivery or only when all the iron has been delivered. The contract clearly contemplated deliveries at different times during June and July, of the iron specified in May. "Sixty days acceptance" may mean an acceptance payable in sixty days for each delivery, or it may mean an acceptance so payable in sixty days after final delivery. Appellee did not ask for acceptances for each delivery, and appellant gave none. The matter is only important now so far as it bears upon the claim made by appellee that it was relieved from obligation

to deliver the balance of the May iron by appellant's refusal to pay the bill for the iron which had been delivered. Whether acceptances were given or not, the bills were not payable in less than sixty days after delivery of the iron. The date of the present delivery seems to have been August 21st, and payment therefor would not be due until sixty days thereafter, whereas payment was asked for September 30th, with the statement that the bill presented, amounting to \$2,636.79, "is now matured." It had not matured so far as we are able to discover from the evidence, and appellant was under no obligation to pay it until at least sixty days from the time of delivery. His failure to pay therefor can not be construed as a default on his part, and did not release appellee from further deliveries in fulfillment of the May orders. We regard the case of Harber Bros. Co. v. Moffat Cycle Co., 151 Ill. 84, as not applicable to the facts before us.

The case has been elaborately presented, both orally and in the briefs, and has received our careful consideration, although we have not deemed it necessary to consider at length every point urged upon our attention. We are compelled to regard the judgment as erroneous, and it will therefore be reversed and the cause remanded.

**The Telluride Power Transmission Company et al. v.
Crane Company.**

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1. **CONTRACTS**—*Question to be Determined from Documents Comprising.*—The fact that the document or documents is or are silent as to one or more matters concerning which there might have been expression is immaterial. In this regard the question before the court is, do the writings upon their face contain a definite contract; do they import a legal obligation without uncertainty as to the object or extent of the engagement.

2. **SAME**—*Signing and Delivery of Papers a Question for the Jury.*—Whether papers purporting to contain a contract were signed by the parties and, if signed, were delivered, are questions of fact for the jury.

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8. *SAME—Made Out Partly by Letters and Partly by Evidence of Conversations.*—If a contract has to be made out partly by letters and partly by evidence of conversations concerning which there is not entire agreement as to what was said or the circumstances under which the utterances were made, the question of whether there was a contract, as well as what it was, is a question of fact for a jury.

4. *SAME—Commercial Correspondence.*—The rule that whether written instruments do or do not constitute a contract is a question of law for the court, applies to commercial correspondence as well as to formal written documents.

5. *SAME—When Presumption is that the Entire Engagement of the Parties is Contained in the Writing.*—When the writing itself upon its face imports a complete legal objection, without uncertainty as to the extent or object of the contract, it is conclusively presumed that the entire engagement of the parties is contained in the writing.

6. *SAME—When Express or Implied Warranty Can Not be Imported into Contract.*—The parties having executed writings expressing upon their face a complete contract, certain as to its object and extent, neither an express nor an implied warranty can be imported into it by proof of prior oral conversation.

7. *SAME—Implied Warranty of Fitness for Purpose for Which Object is Ordinarily Used.*—If an article is to be made or supplied to the order of a purchaser, there is an implied warranty that it is reasonably fit for the purpose for which it is ordinarily used, or fit for the special purpose designed by the buyer, if that be known to the vendor when the order is given.

8. *SAME—Warranties in Bargain and Sale of Existing Chattels.*—In the bargain and sale of an existing chattel by which the property passes, there is not (in the absence of fraud) an implied warranty of the good quality or condition of the thing sold, while there is an implied guaranty that the articles sold by a particular description are of that description.

9. *SAME—When Inducement to Written Contract May be Shown.*—An inducement to a written contract, such as a representation of some particular quality or incident to the thing sold, may in some cases be received in evidence, but a buyer can not show such representation unless he can show that the seller by some fraud prevented him from discovering a fault which he, the vendor, knew to exist.

Assumpsit.—Appeal from the Circuit Court of Cook County; the Hon. HENRY B. WILLIS, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Affirmed. Opinion filed October 24, 1902.

August 31, 1896, the Telluride Power Transmission Company made a contract with one T. B. Rhodes for the erection of a pipe line and flume. Rhodes applied to the Crane

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Company for pipe therefor, and after various negotiations gave to it the following order:

"SALT LAKE CITY, September 14, 1896.

CRANE COMPANY, CHICAGO.

GENTLEMEN: Please ship to Ophir, Colo., the following:

1,300 ft. 16 5 gauge flanged pipe asphalted.

516 " 16" $\frac{1}{2}$ gauge flanged pipe "

with necessary bolt gaskets. To be in transit not later than Oct. 31, 1896.

Terms cash on delivery of pipe.

Yours truly,

T. B. RHODES & Co.

Flange on one length sixteen to fit flange on fifteen."

The Crane Company at once accepted this order.

September 29, 1896, Rhodes wrote to the Crane Company, as follows:

"TELLURIDE, COLO., Sept. 29, 1896.

CRANE & CO., CHICAGO, ILLS.

DEAR SIR: Herewith I hand you list of angles req'd. They should be made as arcs or circles whose radius is 5 times diam. of pipe, and should have flanges for connection with pipe. The shell should be thick enough to give factor of safety of 5 on an assured tensile strength of the steel of 60,000 lbs. per sq. in.

Please make them at once and ship with pipe. I regret exceedingly that we could not get the profile of the pipe line sooner. I will to-morrow order some valves, and will advise you whether any change in length of pipe already ordered will have to be made. Could not get angles and actual surveyed length of line until to-day.

Yours truly,

T. B. RHODES & Co."

With this letter was a table of vertical angles, diameter of pipe and "head in feet," the latter ranging from 983 to 507 feet. December 6, 1896, the Crane Company wrote to Rhodes:

"We have wired you that bends were made of $\frac{7}{16}$ " metal of 60,000 lbs. tensile strength, factor of safety of six, and also advising we would furnish new gaskets for \$50 net."

Rhodes, on January 14, 1897, wrote to the Crane Company:

"We understand that Mr. Nunn will be in Chicago soon,

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if he is not already there, on his way west. * * * We wired you that his engineer was familiar with the pipe, and was in position to pass upon it before any settlement is made, as well as afterward; his brother is the engineer to whom he referred, and he has been trying to have the thickness of the pipe measured. Of course, with the flanges in the pipe, it is impossible to do it correctly. * * * We guaranteed the pipe to stand the required pressure with a factor safety of five. * * * We had the bursting strength figured by a very competent engineer, and told him to allow a factor safety of five, which he undoubtedly did. We did not guarantee the pipe to be of any special thickness; our only guarantee is that it has a factor of safety of five. And that is all that need be said to Nunn by you. * * * We would like for you to make the best possible arrangement with Mr. Nunn, and whatever loss you are at we will make good."

About December 7, 1896, Mr. Nunn applied to the Crane Company to have the pipe then on the cars at Ophir, Colorado, delivered to the Telluride Company; and December 18th wrote to the Crane Company the following letter:

"DEC. 18, 1896.

CRANE CO., 10 NORTH JEFFERSON ST., CHICAGO, ILL.

GENTLEMEN: I am advised from Telluride, Colorado, that Mr. T. B. Rhodes is unable to take up your draft against bill of lading for about \$2,000 on account of material ordered by him to complete a contract with the Telluride Power Transmission Company. We have advanced Mr. Rhodes a good deal beyond the payments provided for by our contract with him and it is not entirely convenient for me to pay your draft while absent from Telluride. I shall return next month. If you will order the material delivered to us by the railway company and it passes the inspection of our engineer, we will receive it at once and pay your draft on February 1st and also greatly appreciate your courtesy in the matter. On account of the well known strength of our company I have no hesitation in asking the credit. Mr. James Campbell of St. Louis is the president, and Mr. H. R. Newcomb, treasurer of the Savings and Trust Company of Cleveland, Ohio, is the treasurer of our company.

Please telegraph me care Holland House, New York, your decision.

Very truly,

LUCIEN L. NUNN."

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To this the Crane Company, December 22d, replied by letter containing, among other things, the following :

“ Your proposition is to pay us on February 1st, provided the material, when delivered, passes the inspection of your engineer. We can not consent to any condition of this character, because it is too general in its terms. We do not know what your arrangement was with Mr. Rhodes, nor what kind of inspection would be required. We simply know the material we have furnished is strictly in accordance with Mr. Rhodes’ order to us, and we should not be willing to deliver it except on absolute payment, or promise of payment. You will no doubt appreciate the correctness of our position on this point.

Yours truly,

CRANE COMPANY.

O. P. DICKINSON.”

December 30, 1896, the Crane Company telegraphed to Mr. Nunn asking for a reply to its letter of the 22d. Mr. Nunn replied as follows :

“ HOLLAND HOUSE, NEW YORK, Dec. 30, 1896.

CRANE COMPANY, 10 NORTH JEFFERSON ST., CHICAGO, ILL.

GENTLEMEN : I greatly regret the delay in adjusting the matter of the pipe shipped to Mr. T. B. Rhodes, at Telluride, Colorado. I have but just returned from my Christmas vacation.

My letter to you must have been very ambiguous for you have entirely misunderstood my proposition. It was not to receive the pipe, and then pay for it, if satisfactory, but to ascertain by inspection whether it was such as we required, and if it was, to receive it immediately and pay for it on the 1st of February next. I am confident Mr. Rhodes is financially unable to comply with his contract, with either you or us. Of course, as we did not order the pipe, you do not expect us to take it and pay for it unless it is such as we can use; but if it is such as we require we are anxious to have it immediately, and of course, will pay your price. I do not like to give a promissory note. Our company has never executed a note in its entire history. A note would add nothing to your security; if we take the material we are bound to pay for it.

Please do me the courtesy of delivering this shipment to us without further delay, and I will telegraph my engineer to inspect it at once, and receive it on the cars, if he thinks the strength sufficient. Being away from home, I should

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like very much to have this favor. Kindly wire me on receipt of this.

Very truly yours,

L. L. NUNN."

January 23, 1897, the Crane Company telegraphed the Telluride Company :

"Railroad wires cars pipe still uncalled for and must be disposed of without delay. Nunn when here agreed to accept pipe, and we supposed it taken before this. Why delay? Answer."

To this the Telluride Company replied, January 23, 1897 :

"Delayed account complications with contractors, but practically settled."

February 5, 1897, Mr. Nunn wrote the Crane Company in part as follows :

"DENVER, COLORADO, February 5, 1897.

CRANE COMPANY, 10 NORTH JEFFERSON ST., CHICAGO, ILLINOIS.

GENTLEMEN: I was delayed in my return west by the very serious illness of my brother, and but just arrived here this morning. My engineer from Telluride met me, and explained the situation respecting the shipment of pipe to Mr. Rhodes, at Ophir. The whole matter is certainly very badly mixed; Mr. Rhodes can not be found; he has abandoned the matter, and the demurrage on the four cars since November 16th, 17th and 18th amounts to something over \$400. My firm has represented the railroad, as attorneys, ever since its construction. I called to-day and used all the influence I could to have the demurrage charge deducted, and succeeded to the extent of having it reduced to \$100.

We regret very much that you have suffered any inconvenience, and we are anxious to render you any assistance in our power, but of course we are not responsible for Mr. Rhodes' contracts, and it would seem from the condition he is in that he is entirely unable to make any use whatever of the pipe, and that you would therefore have it on your hands, with freight charges one way, amounting to more than half the price of the pipe.

If you will instruct us by wire Monday morning, to do so, we will settle with the railroad and stop further expense, and will take the pipe at the original bill, paying one-half within a few days, and the other half about June 1st, charging you the amount paid for demurrage."

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To this the Crane Company immediately replied by wire:

"L. L. NUNN, AGT. T. P. & T. CO., TELLURIDE, COLO.:

We accept proposition contained in your letter fifth.
CRANE CO."

And wrote:

"CHICAGO, February 8, 1897.

L. L. NUNN, MANAGER, TELLURIDE POWER & TRANSMISSION
CO., TELLURIDE, COLO.

DEAR SIR: We received, this morning, your favor of the 5th, and as requested, immediately wired you in reply, 'We accept proposition contained in your letter 5th.'

This proposition is, that you will take the pipe which we sold to T. B. Rhodes & Co., paying the freight and demurrage charges, and that you will then pay us the amount of our original bill less \$100 demurrage, making payments one-half within a few days and the other half about June 1st.

The amount of the original bill referred to was \$2,048.77. From this is to be deducted a freight allowance of \$72.68, leaving the net amount \$1,976.09, as stated in our letter of Dec. 22nd, addressed to you at New York.

We had rather expected to receive payment of the full amount now, but are willing to make the concession of time in view of all the circumstances and especially because you promise to give us orders for additional pipe. We shall be glad to receive such orders and think that by dealing directly with you we shall avoid any misunderstandings.

Yours truly,

CRANE COMPANY.

O. P. DICKINSON."

Appellants then received and used the pipe.

Upon the trial it was stipulated:

"A question has arisen as to whether plaintiff or the defendants are entitled to open and close the argument in the above entitled cause, and for the purpose of disposing of the question it is agreed between the parties hereto that wherefore the defendants purchased from the plaintiff a lot of pipe then on the cars at the town of Ophir, Colorado, at the agreed price of \$1,876.09; that \$1,000 was paid on account of said purchase on June 29, 1897, and that no other payments have been made; and it is further agreed that defendants received said pipe; and that this agreement shall be read in evidence when the jury is sworn to try the

issues in this case, or to the court, if the jury should be waived, and that thereupon the defendants shall be permitted to offer their evidence, and that counsel for defendants shall have the opening and closing arguments."

Appellee brought suit to recover the unpaid \$876.09. Appellants pleaded separate pleas of the general issue and set-off, alleging that the defendants were engaged in the business of generating electricity by water power; that the plaintiff sold the defendants pipe to carry water for that purpose, which the plaintiff agreed was of a certain strength, quality and thickness; of the best material in the market suitable for the purpose for which it was to be employed; of sufficient quality and strength to carry water, as aforesaid, and to withstand the pressure consequent upon the transmission of said water; that the pipe was not made in accordance with the specifications and requirements in the order for the same, neither was it of the strength, quality and thickness agreed by the plaintiff, nor of sufficient strength, quality and thickness to transmit such water, but by reason of the many imperfections and of its failure to come up to the quality, strength and thickness agreed to be furnished, and by reason of its poor quality and the poor character of the labor and workmanship employed in the manufacture of the same, burst, repeatedly, so that the defendants could not use the same for the carrying of said water, whereby the defendants were damaged to the extent of \$50,000.

The defendants offered evidence tending to show that Rhodes, before giving his order, showed Mr. Lee, the agent of the Crane Company, his contract with the Telluride Company and the profile, showing the requirements and water pressure of the contemplated line; that Mr. Lee understood that the pipe was to have a safety factor of five and a tensile strength of 60,000 pounds to the square inch, and said that that material would be furnished; Rhodes, upon cross-examination, testified that he did not understand the Crane Company to be manufacturers; that he understood they bought on the market and were just jobbers.

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Defendants also offered evidence tending to show that when, after the failure of Rhodes to complete his contract, Mr. Nunn called upon the Crane Company with reference to the undelivered pipe then on the cars at Ophir, and, mentioning the factor of safety required and amount of head of water the pipe would have to stand, was assured by Mr. Willard of the company that the quality of the pipe was the very best; that the pipe was installed and broke under the water pressure, causing great damage; that the pipe was apparently burned in welding and had not a tensile strength of 60,000 pounds to the square inch, nor a safety factor of five. This evidence the court excluded, holding that the contract was in writing and embraced in the letters and telegrams hereinbefore set forth. The jury were instructed to return a verdict for \$876.09.

KRAUS, ALSCHULER & HOLDEN, attorneys for appellants.

JAMES H. BARNARD, attorney for appellee; E. M. ASHCRAFT and E. M. ASHCRAFT, Jr., of counsel.

MR. JUSTICE WATERMAN delivered the opinion of the court.

Appellants contend that the contract was partly oral and partly in writing and that whether it was a parol or written contract is a question of fact to be determined by a jury.

That the construction—meaning of the words employed to express a contract—is to be determined by the court, is undisputed. Where the execution, signing and delivery of written instruments is unquestioned, in the absence of accident, fraud or mistake, whether the written papers, one or more, constitute a contract, as also whether therein is expressed the entire agreement of the parties, is to be decided by the court.

The fact that the document or documents is or are silent as to one or more matters concerning which there might have been expression, is immaterial. In this regard the question before the court is, do the writings upon their face contain a definite contract—import a legal obligation—without uncertainty as to the object or extent of the engage-

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ment. *Seitz v. Brewers Refrigerating Co.*, 141 U. S. 510-516; *Scanlan v. Hodges*, 52 Fed. Rep. 354; *Dunn v. Rothermel*, 102 Pa. St. 272-282; *Roe v. Taylor*, 45 Ill. 485-491; *Goddard v. Foster*, 17 Wall. 123-142; *Thompson on Trials*, Sec. 1067.

Whether papers purporting to contain a contract were signed by the parties, and, if signed, were delivered, are questions of fact for the jury. *Thomas v. Barnes*, 156 Mass. 581, 584.

If a contract has to be made out partly by letters and partly by evidence of conversations concerning which there is not entire agreement as to what was said or the circumstances under which the utterances were made, the question of whether there was a contract, as well as, if so, what it was, is a question of fact for a jury. *Thompson on Trials*, Sec. 1083; 1 *Taylor on Evidence*, Sec. 36; 1 *Story on Contracts*, Sec. 18.

The rule that whether written instruments do or do not constitute a contract is a question of law for the court, applies to commercial correspondence as well as to formal written documents. *Scanlan v. Hodges*, 52 Fed. 354-355.

When the writing itself upon its face imports a complete legal obligation, without uncertainty as to the extent or object of the contract, it is conclusively presumed that the entire engagement of the parties is contained in the writing. *Greenleaf on Evidence*, Sec. 275; *Seitz v. Brewers' Refrigerating Co.*, 141 U. S. 510-517; *Benjamin on Sales*, Sec. 202.

The parties having executed writings expressing upon their face a complete contract, certain as to its object and extent, neither an express nor an implied warranty can be imported into it by proof of prior oral conversation.

This suit is not brought upon the contract made by the Crane Company with Mr. Rhodes. The pipe purchased by him having been shipped to Ophir and being there upon the cars ready for delivery upon payment of the purchase price, appellants asked to have that pipe, then on the cars at Ophir, delivered to them.

Concerning an agreement for such delivery to appellants various letters and telegrams were exchanged, with the

result that by the letter from Nunn to appellee, dated February 5th, and replies thereto by telegraph and mail, each dated February 8th, a contract was made for the sale and delivery at Ophir of certain property, then existing, for a certain price.

There was no contract with appellants to procure, select or manufacture; nor is there any evidence that the Crane Company were the manufacturers of the pipe in question; on the contrary Mr. Rhodes, appellants' witness, testified that in making his contract with the Crane Company for the pipe, he did not understand the Crane Company "to be manufacturers;" that he understood they bought on the market and were just jobbers.

If an article is to be made or supplied to the order of a purchaser, there is an implied warranty that it is reasonably fit for the purpose for which it is ordinarily used, or fit for the special purpose designed by the buyer, if that be known to the vendor when the order is given. Benjamin on Sales, 645.

In the bargain and sale of an existing chattel by which the property passes, there is not (in the absence of fraud) an implied warranty of the good quality or condition of the thing sold; while there is an implied guaranty that the articles sold by a particular description are of that description. Benjamin on Sales, Secs. 647-600; Barr v. Gibson, 3 M. & W. 390; Taylor v. Bullen, 5 Ex. 779.

An inducement to a written contract, such as a representation of some particular quality or incident to the thing sold, may, in some cases, be received in evidence; but a buyer can not show such representation unless he can show that the seller by some fraud prevented him from discovering a fault which he, the vendor, knew to exist. Benjamin on Sales, Sec. 621; Wright v. Crookes, 1 Scott, N. S. 685-678; Taylor v. Bullen, 5 Exchq. 779-783.

There is no evidence that the Crane Company had either notice or knowledge of any defect in the pipe sold to appellants, or that by any fraud they prevented a discovery of faults.

We do not regard the case of *Ruff et al. v. Jarrett*, 94 Ill. 475; as "on all fours" with the present or as allowing evidence of conversations to be introduced to add to or qualify the terms of a written contract. In that case the court said that the written instrument there considered could not be regarded as a contract without the aid of extrinsic evidence.

We do not think that appellants had an opportunity for inspection. They did have the right to refuse to buy without previous inspection.

It is manifest from the correspondence that the Crane Company would not deliver the property without payment or a definite promise to pay; in other words, unless before delivery the property was purchased by appellants. And it is further manifest that appellants purchased the property upon the terms of the definite proposition contained in their letter dated February 5th, accepted by appellee by telegram dated February 8th, and by letter of the same date in which the written proposition of appellants was repeated. These three writings contain the entire contract; before them there was no meeting of minds; they have all the force of a formally executed written document.

The order of Mr. Rhodes to the Crane Company, made September 14th, was in writing; it contained nothing as to quality of pipe but was definite as to size, quantity and some other matters.

So soon as it was accepted there arose a contract for such pipe, sold at the market price for cash on delivery. It was, as Rhodes understood, made by him with a jobber. That such pipe was by the appellee sent to Ophir, it did say in its letter of December 22d, and it may well be said that such representation was an inducement to the contract made by the letters of February 5th and 8th, but there was no evidence that appellee knew that it was false, nor that the pipe was not such as Rhodes ordered.

Rhodes did, September 29th, write to the Crane Company that "the shell," whether of pipe or connections is uncertain, should be thick enough to give a factor of five on an

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assured tensile strength of the steel of 60,000 pounds per square inch; that appellee undertook to make "the shell" of the pipe of such thickness or strength is not shown; the order of September 14th was accepted long before September 29th. September 30th Rhodes wrote to appellee, "Ship the pipe as ordered except," etc. The order for the pipe was given to appellee September 14th.

The stipulation upon the trial was made merely for the purpose of giving the defendants a right to open and close, and we do not think should be construed as affecting the right of appellants or either of them to any set-off they might otherwise interpose.

If the correspondence that passed between appellants and appellee February 5th and 8th does not upon the face thereof contain a written repository of a definite agreement, certain as to object and extent, so that the court, standing in the shoes of the parties, can see that in these writings there is contained such agreement, then the writings are not conclusive as to what the contract was; if there is, as we find in these writings, such plain agreement, then by the well established rule of law all previous negotiations were merged therein.

The judgment of the Circuit Court is affirmed.

American Fine Art Company et al. v. Edward W. Voigt.

1. *INJUNCTIONS—What the Bill Should Contain.*—A bill for an injunction should contain a prayer therefor in the prayer for process as well as in the prayer for relief.

2. *SAME—To Enjoin Judgment—Sec. 8, Chap. 69, R. S.*—Section 8 of chapter 69 of the Revised Statutes, provides that before an injunction shall issue to enjoin a judgment, the complainant shall give bond to the plaintiff therein, in double the amount of such judgment, with sufficient surety approved by the court, judge or master, conditioned for the payment of all moneys and costs due to the plaintiff in the judgment, and such damages as may be awarded against the complainant in case the injunction is dissolved.

Bill for an Injunction.—Appeal from the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge presiding. Heard in the Branch Appellate Court at the March term, 1902. Reversed. Opinion filed October 24, 1902.

C. C. H. ZILLMAN, attorney for appellants.

CURTIS H. REMY, attorney for appellee.

MR. JUSTICE WATERMAN delivered the opinion of the court.

Appellee filed his bill against the American Fine Art Company and others, alleging that the 16th day of May, 1902, appellee caused to be entered against him, appellee, in the Circuit Court of Cook County, a judgment for \$24,991.75, and obtained without notice and without bond an injunction as follows:

"We, therefore, in consideration thereof, and of the particular matters in said bill set forth, do strictly command you, the said Christian C. H. Zillman, American Fine Art Company, a corporation, Ernest J. Magerstadt, sheriff, and the persons before mentioned, and each and every of you, that you do absolutely desist and refrain from selling, assigning or transferring a certain judgment in cause No. 225,426 in this court for \$24,991.75, recovered May 16, 1902, or any part thereof, or from issuing execution thereon or taking any steps to collect the same, or from substituting of record other counsel to act for said American Fine Art Company with reference to enforcing said judgment against complainant or from interfering with his person or property."

The following day, the bill as to Ernest J. Magerstadt, sheriff, was dismissed, so that as the cause comes to this court the injunction is only against the American Art Company and Christian C. H. Zillman.

Section 8 of Chapter 69 of the Revised Statutes provides:

"Before an injunction shall issue to enjoin a judgment, the complainant shall give bond to the plaintiff therein, in double the amount of such judgment, with sufficient surety approved by the court, judge or master, conditioned for the payment of all moneys and costs due to the plaintiff in the judgment, and such damages as may be awarded against the complainant in case the injunction is dissolved."

Appellee contends that the aforementioned judgment is not enjoined. An injunction is always personal, that is to say, some person, natural or artificial, is forbidden to do something. The language of the statute is, "before an injunction shall issue to enjoin a judgment."

In the present case the plaintiff in the judgment is not only enjoined from selling, assigning or transferring the judgment, but from issuing execution thereon or taking any steps to collect the same, and from substituting of record other counsel to act for said American Fine Art Company, with reference to enforcing said judgment against complainant or from interfering with his personal property. This is clearly such an injunction as the statute provides shall not be issued without bond to the plaintiff in double the amount of the judgment, with approved surety, conditioned for the payment of all moneys and costs due to the plaintiff in the judgment in case an injunction is dismissed.

The contention of appellee that the only effect of the injunction is to restrain the bringing of another suit in Michigan by enjoining appellant from getting a transfer in the Circuit Court of Cook County upon which to base said suit, is unwarranted.

The bill does not contain any proper prayer for such injunction as was issued. The prayer of process is merely that the usual writ of summons may issue against the defendants. A bill for an injunction should contain a prayer therefor in the prayer for process as well as in the prayer for relief. *Willett et al. v. Woodhams et al.*, 1 Ill. App. 411; *Primmer v. Patten*, 32 Ill. 528.

It is questionable whether it sufficiently appeared from the bill or affidavit accompanying the same that the right of the complainant would be undoubtedly prejudiced if an injunction was issued without notice. This is, however, now quite immaterial.

For the failure to file bond as required by statute, the order of the Circuit Court granting an injunction is reversed.

The Lake Street Elevated R. R. Co. v. Miranda R. Shaw.

1. **VERDICTS**—*Where a Reviewing Court Will Set Aside.*—It is only in cases where a reviewing court can see clearly that the jury have found against the weight of the evidence or have been moved by passion, prejudice, misconception or partiality, that the court should set aside the verdict. To hold otherwise is to invade the province of the jury, whose peculiar function, in cases presenting a conflict in the evidence, is to determine where the truth lies.

2. **NEGLIGENCE**—*When Plaintiff is Entitled to Recover.*—The plaintiff is entitled to a verdict and judgment, if it be shown by the evidence that while she was in the exercise of reasonable care for her own safety she was injured by the negligent act of the defendant.

3. **PLEADING**—*What a General Averment of Negligence Admits.*—In pleading, the general averment of negligence is sufficient to admit proof of gross negligence.

4. **ESTOPPEL**—*By Asking and Giving of an Instruction—Negligence.*—Where a party defendant asks the court to give, and the court does give, an instruction submitting to the jury the facts in evidence bearing upon the question of the negligence of the plaintiff, that party is thereby estopped from afterward urging that such facts constitute negligence *per se*.

Mr. Justice BALL dissenting.

1. **VARIANCE**—*Between Declaration and Proof.*—A declaration charging that the defendant carelessly and negligently caused the said train of cars to be suddenly and violently started and moved, etc., whereby the plaintiff was injured, states a different cause of action from that proved by evidence that her injury was caused by the negligent starting of the train before she had a reasonable time and opportunity to get off, and before the gates were closed; that the train started evenly and smoothly, and not suddenly and violently, and that she was thrown down, not by a lurch of the train, but by the sudden arrest of the motion of the train, which her body had taken on, when her foot was planted upon the station platform.

2. **WITNESSES**—*Right to State Complaints of Plaintiff.*—A witness who is not an expert has no right to state the complaints of the plaintiff, not made at the time of the injury.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge presiding. Heard in this court at the October term, 1901. Affirmed. Mr. Justice BALL dissenting. Opinion filed October 27, 1902.

Action for personal injuries.

The declaration, consisting of but one count, alleges that the defendant was operating the Lake Street Elevated Rail-

road; that September 27, 1898, plaintiff became a passenger upon one of its trains to be carried from Wabash avenue to Sacramento avenue; that she took a seat in the rear car of that train; that "it became and was the duty of the defendant upon the arrival of said train at the Sacramento avenue station aforesaid, a station on the line of defendant's road, to give the plaintiff an opportunity of safely alighting therefrom, and then and there to stop said train a reasonable time to enable the plaintiff so to alight therefrom safely as aforesaid, yet the defendant did not regard its duty or use due care in that behalf, but on the contrary thereof, upon the arrival of said train at Sacramento avenue station aforesaid, and while the plaintiff with all due care and diligence was then and there about to alight therefrom, the defendant carelessly and negligently caused the said train of cars to be suddenly and violently started and moved, and thereby the plaintiff was thrown with great force from and off said train to and upon the wooden platform of said station," etc.

When the train stopped at Sacramento avenue appellee passed out upon the front platform of the rear car for the purpose of leaving the train. Just in front of her were two men, Mr. Walker and Mr. Sylvester, also passengers, in the act of alighting. They left the car and she immediately followed. Before she stepped off, the train had started up. She says that as she raised her foot to step off, the cars gave a sudden lurch, and the next thing she knew she was flat on the platform. Mr. Walker says that the conductor rang the bell to start and the car started just as he was about to step off the car, and that when appellee got off the car was moving. Mr. Sylvester, who followed Mr. Walker, says as he stepped off he felt the train moving, and looking back he saw appellee as she was stepping off the car onto the platform, and that when he turned around the train was moving faster than it was when he alighted. Mr. Dierkes, who was on the station platform for the purpose of boarding the train, says that he jumped on the rear platform of the second car; that the car had started before he jumped, and that as he jumped appellee stepped off the

front platform of the third car when the car was in motion; that she was not thrown off, but stepped off. The rear guard says that he noticed that the train was moving when a gentleman stepped off the car; that appellee was following him, and that she stepped off and fell to the station platform.

This train of three cars was run by a motorman and two guards. The motorman was in the front part of the front car. Kettlestrings, the front guard, stood on the platform between the first and second cars from the front. Ball, the rear guard, occupied a similar position between the second and third cars. The movement of the train was controlled by the sound of bells, one of which was in the cab of the motorman, and the other was at the rear of the first car where the front guard was stationed. When the train was to be started from a station it was the duty of the rear guard, when his platforms were cleared and he had closed his gates, to ring the bell at the rear of the first car, and then, and not until then, did the front guard ring the bell in the cab of the motorman. It was the duty of the latter upon receiving this signal, and not before, to start the train. In this instance this salutary rule was violated. Before the platforms between the second and third cars were cleared, and before the rear guard had closed his gates or had given the proper signal by ringing his bell, the front guard rang the motorman's bell and the train started.

CLARENCE A. KNIGHT and WILLIAM G. ADAMS, attorneys for appellant.

THEODORE G. CASE, JOHN T. MURRAY and STACY W. OSGOOD, attorneys for appellee; A. W. BROWNE, of counsel.

MR. PRESIDING JUSTICE BALL delivered the opinion of the court.

Upon the undisputed evidence in this case, the negligence of the defendant in starting the train before plaintiff and other passengers had a reasonable time and chance to leave the car, and before the gates were closed, is clearly established.

The jury have found that plaintiff, in attempting to leave the car as she did, and when she did, was in the exercise of reasonable care for her personal safety, and we find nothing in the record to the contrary.

There is a sharp conflict in the evidence as to the extent of the injuries of the plaintiff occasioned by her fall upon the station platform; she contending that by reason thereof she sustained a severe and permanent injury to her right side and right hip, which so weakened her right hip that twice since such injury it has suddenly given way, causing her to fall, with serious results in each instance. It is not disputed but that for five weeks after the accident she remained constantly in bed; and that when she got up she was compelled to use two crutches for a time, and then one crutch and a cane for about one year; and after that she generally used a cane in getting about; and that up to the time of the trial she walked lame.

Appellant claims that her right hip was not hurt, but that she fell on her left side and that her injuries were trivial, and that the injuries to the right side and hip were occasioned by other falls, for which it is entirely blameless. Upon this ground it asserts that the verdict of \$5,000 is excessive.

If the jury believed the contention of the plaintiff, then the damages, though large, are not so excessive as to call upon us to reverse the case for that reason. It is only in cases where a reviewing court can see clearly that the jury have found against the weight of the evidence, or have been moved by passion or prejudice, or misconception or partiality, that the court should set aside the verdict. To hold otherwise is to invade the province of the jury, whose peculiar function, in cases presenting a conflict in the evidence, is to determine where the truth lies.

Mary Fitzgerald, a non-expert witness, was asked in regard to appellee: "What did you notice about her?" To which she answered: "I saw that her knee was bruised, the right knee and hip. She complained of a pain in her right hip that way, and her face." Motion by appellant to

strike out the words, "She complained of pain in her right hip." Motion denied, and exception.

There is sufficient evidence to justify the jury in finding that the right hip of appellee was injured by the fall on the station platform, without taking into account the testimony of this witness; and therefore the error in refusing to strike out the foregoing words, if it was an error, is not one for which this case should be reversed.

The verdict of the jury should not be disturbed on the ground that the evidence does not warrant the finding. It is a question of fact whether the "defendant carelessly and negligently caused the said train of cars to be suddenly started and moved" while appellee was alighting from the car. The appellee says:

"I started to get off, and as I raised my foot to step the cars gave a lurch, and the next thing I knew I was flat on the platform."

The evidence of other witnesses tends to prove that the train started slowly and smoothly. There is no fixed standard by which to determine when a car or other movable object is started "suddenly." This car was started suddenly in the sense that it was started before the outgoing passengers had time to step off, before the gates were closed, and before a proper signal had been given for the departure of the train from the station. When the plaintiff reached the gate, and was stepping off, the evidence does not show that she knew the car was in motion. All the then conditions told her that it was still at rest, for passengers were getting on and off, the gates were open, and the guard who stood within two or three feet from her had not yet given the signal to start. A car may be started "suddenly" in point of time, or it may be started "suddenly" in manner of motion. It was the duty of the appellant to stop the train a sufficient time to allow appellee a reasonable opportunity to step off; and to start the train before that time elapsed and without notice to her, was a clear act of negligence. In this sense the car was started "suddenly." It is not necessary for a recovery, if this accident was caused by "suddenly" starting the train, that the appellee should

go on to prove that it was also "violently" started. The appellee is entitled to a verdict and judgment, if it be shown by the evidence that while she was in the exercise of reasonable care for her own safety she was injured by a negligent act of the appellant charged in the declaration. I. C. R. R. Co. v. Souders, 178 Ill. 588.

In Ill. Cent. Ry. Co. v. Aland, 192 Ill. 37, the plaintiff alleged that while he was getting into a car, for the purpose of unloading it, the defendant, by its servants, "moved and propelled with great force a certain engine" against such car, whereby he was thrown off and injured. It was contended by the defendant that there was no evidence tending to prove that the engine was propelled with "great force." The court say :

"It is clear that the evidence tended to prove that the force was sufficient to suddenly move the car upon which the plaintiff was in the act of climbing, and cause his injury, and he was required to prove nothing more. There is no standard by which to determine whether a train is being moved with great force."

In pleading, the general averment of negligence is sufficient to admit proof of gross negligence. R. R. & St. L. Ry. Co. v. Phillips, 66 Ill. 548. Where a party defendant asks the court to give and the court does give an instruction submitting to the jury the facts in evidence bearing upon the question of the negligence of the plaintiff, that party is thereby estopped from afterward urging that such facts constitute negligence *per se*. Chicago Terminal Ry. Co. v. Schmelling, 197 Ill. 619-625.

We have carefully examined the action of the trial court in admitting the statement of non-expert witnesses as to the physical condition of appellee before and after the accident in question, and do not find reversible error therein.

The court did not err in refusing to give to the jury the eighteenth instruction presented by appellant.

The foregoing is the opinion of a majority of the court, but the writer believes that the trial court erred in refusing to instruct the jury to find for the defendant at the close of all the testimony, as then requested.

The declaration charged that the defendant "carelessly and negligently caused the said train of cars to be suddenly and violently started and moved," etc., whereby she was injured, etc.; while the evidence shows that her injury was caused by the negligent starting of the train before she had a reasonable time and opportunity to get off, and before the gates were closed; that the train started evenly and smoothly, and not "suddenly and violently;" and that she was thrown down, not by a lurch of the train, but by the sudden arrest of the motion of the train, which her body had taken on, when her foot was planted upon the station platform. Hence, in my opinion, the declaration states one cause of action, while the proof shows a different cause of action. *Moss v. Johnson*, 22 Ill. 640.

The refusal to strike out from the testimony of Mary Fitzgerald the words, "She complained of a pain in her right hip," in my opinion is reversible error. One of the contested questions is whether it was the right hip or the left hip of appellee that was injured by this fall upon the station platform. The witness was not an expert, and therefore had no right to state complaints of the appellee, not made at the time of the injury. *W. C. S. Ry. Co. v. Kennelly*, 170 Ill. 512.

The judgment of the Circuit Court will be affirmed.

Charles C. Landt et al. v. James C. McCullough.

1. *EVIDENCE—Lease Containing Alterations and Interlineations.*—Before a lease containing divers alterations and interlineations should be admitted to evidence, it should be shown that all material alterations or interlineations were made before its execution.

2. *PLEADING—Leave to Amend is Not in Itself an Amendment.*—Where a lease offered in evidence is objected to on the ground that there is a variance between it and the declaration, a mere leave to amend the declaration to make it correspond with the lease, does not amount to such amendment.

3. *PRACTICE—Offering Secondary Evidence Without Proving Service of Notice to Produce Original.*—It is error for the court to admit

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purported copies of an original instrument in the possession of the opposite party, where there is no showing, beyond the mere statement of counsel, that any notice has ever been served upon the possessors of the instruments or their counsel, to produce the original documents.

4. *SAME—Waiver of Objection to Action of Trial Court.*—It is the duty of a litigant, who on appeal complains of the action of the trial court, to call to the attention of that court in some way the reasons of his complaint; otherwise they are waived.

Assumpsit, on a lease. Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge presiding. Heard in this court at the October term, 1901. Affirmed. Opinion filed October 27, 1902.

Statement.—Appellee brought suit in assumpsit on a lease made by him, March 20, 1889, to James M. Stebbins, as lessee, for a term of fifty years, at an annual rental of \$1,050, payable in equal quarterly installments of \$262.50 each, on the first days of August, November, February and May in each year for the first sixteen years, which demises certain premises in the town of Lake, Cook county, Illinois, and contains, among other covenants, a covenant for the erection of buildings thereon by the lessee. The declaration, among other things, charges that the lessee on October 12, 1892, assigned the lease to the defendants in writing; that the lessor consented to such assignment, in accordance with the terms of said instrument in writing; that the defendants thereupon entered into the possession of said premises and undertook and promised to pay the rent, and that there was due to the plaintiff for rent of the demised premises the sum of \$5,000. The plea was the general issue. The case was tried on the short cause calendar before the court and a jury, and the trial resulted in a verdict, directed by the court, in favor of appellee and against appellants for \$3,750.50, upon the close of all the evidence, the appellants having offered no evidence, and judgment thereon, from which the appeal is taken.

FOLLANSBEE & FOLLANSBEE, attorneys for appellants.

E. W. ADKINSON, attorney for appellee.

MR. JUSTICE WINDES delivered the opinion of the court.

It is claimed by appellee's counsel that the assignment of errors as originally made and the abstract of record were insufficient, and for this reason the judgment should be affirmed. The point is obviated by a new and sufficient assignment of errors and additional abstracts of record filed, by leave of this court, subsequent to the filing of appellee's brief and prior to the time the cause was taken by the court.

During the progress of the trial appellee's counsel offered in evidence the certain lease purporting to be made by the parties, alleged in the declaration, which was objected to by appellants' counsel, for the reason that there appeared upon the face of the lease divers alterations and interlineations which were then and there pointed out by counsel, and the lease was further objected to as evidence because the said alterations and interlineations were in no way explained. The objections were overruled by the court and an exception preserved. The ruling was, in our opinion, clearly erroneous. The alterations and interlineations seem to have been apparent on the face of the lease and were numerous, a statement of which would unduly extend this opinion. Many of them were material and before the lease should have been admitted in evidence it was incumbent on the appellee to show that all material alterations or interlineations were made before its execution. *Hodge v. Gilman*, 20 Ill. 437-41; *Pyle v. Oustatt*, 92 Ill. 209-13; *Sisson v. Pearson*, 44 Ill. App. 81-3, and cases cited.

The lease was further objected to by reason of a variance between it and the declaration, which was pointed out to the court, whereupon appellee's counsel asked leave to amend the declaration to correspond with the lease offered in evidence, which was allowed, but no amendment was made to obviate the variance. This also was error, the variance being a material one. *City of Chicago v. Moore*, 139 Ill. 201-9; *R. R. Co. v. Wieczorek*, 151 Ill. 579-83; *Sinsheimer v. Skinner Mfg. Co.*, 165 Ill. 116-20.

In the further progress of the trial appellee's counsel stated

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to the court that he had served notice upon appellants' counsel to produce at the trial two certain instruments or he would offer secondary evidence of the same. Appellee's counsel then asked appellants' counsel if he had said instruments, to which appellants' counsel and also appellants themselves stated that they did not have the instruments called for. Whereupon, against the objection of appellants' counsel, the court permitted oral evidence tending to establish an assignment in writing of the lease offered in evidence, and a written consent by the lessor to such assignment. The court also, against objection of appellants' counsel, permitted in evidence purported copies of the same. To all these rulings of the court exceptions were duly preserved. The rulings were, in our opinion, erroneous, in that there was no showing, beyond the mere statement of counsel, that any notice had ever been served upon appellants or their counsel to produce the original documents, purported copies of which were admitted in evidence, nor was there any showing that appellants or either of them ever had in their possession or control the alleged assignment of the lease or the alleged written consent thereto. *Matteson v. Noyes*, 25 Ill. 591; *Bishop v. Am. Preservers' Co.*, 157 Ill. 284-307; 1 *Greenleaf on Evidence*, 560; 1 *Jones on Evidence*, 218.

For appellee it is claimed that a certain bond offered in evidence, signed by appellants, independent of the evidence above objected to, shows that the lease sued on was assigned by the lessee, Stebbins, to appellants, but we think the contention is untenable. The recital in the bond referred to states that the lease, describing it, was "assigned by said Stebbins to said Landt and Moore," but it fails to show whether the assignment was in writing. The allegation of the declaration is that the assignment was in writing, and consequently this proof would be insufficient to sustain the declaration.

Appellee's counsel further claims that the motion for a new trial was waived by appellants' counsel on the hearing. The bill of exceptions shows, in substance, that at the close

of the evidence the court instructed the jury to render a verdict in favor of appellee for \$3,937.50, whereupon appellants' counsel said, "I enter a motion for a new trial," and the court then stated, "I will dispose of the motion for a new trial now." Counsel for appellants then stated, "I do not think I care to urge the reasons that I have upon the court further than to say that the evidence does not entitle them to recover any verdict, from the state of facts." The following then occurred :

"The Court : I will hear your reasons now.

"Mr. Follansbee : I think I will not urge my reasons for a new trial on the court, for fear that you will grant it."

Appellee's counsel then moved for judgment, and the court stated : "If that is all to be said on the motion for a new trial, the motion will be overruled." Then follow copies of certain exhibits offered in evidence during the course of the trial, an instruction directing a verdict for the appellee, and an instruction asked by appellants, which was refused, the exceptions of counsel to the court's rulings, and a statement of the verdict rendered by the jury. Then follows a further statement that the "defendants, by their counsel, then and there moved the court to set aside the verdict so rendered, and grant a new trial of the cause, and filed the following reasons in writing for their motion." Then follows appellants' motion for a new trial, setting out nine different reasons why a new trial should be granted, following which is a statement that the court denied the motion and gave judgment on the verdict against the defendants, with the usual and formal conclusion of a bill of exceptions, signed and sealed by the trial judge. There appears upon a wrapper attached to and following the written motion and reasons for a new trial an indorsement of the number and title of the cause, also the following : "Assignment of Errors ;" also in pencil the following : "Filed Apl. 24, 1901. John A. Linn, Clerk." There is nothing else in the bill of exceptions from which it can be certainly told when the motion for a new trial and reasons therefor were filed, and when the court, in fact, took

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action thereon. Appellee's counsel, in their brief, state that the motion in writing for a new trial and reasons were filed on the 24th of April, 1901, but there is nothing in the record on which to base this claim, except the pencil indorsement upon the wrapper, as above stated, which purports to be an "assignment of errors,"—not the motion for new trial. There is no certificate of the clerk that this motion was filed on the 24th day of April, 1901, but the contrary is stated, viz., that when the jury rendered its verdict, which was on April 22, 1901, counsel "then and there moved the court to set aside the verdict and filed the following reasons in writing for their motion." Twice before this it appears in the bill of exceptions, inferentially, by statements of both counsel, that the reasons for a new trial were before the court when it was stated by the court that the motion would be overruled. Counsel for appellants stated that he would not urge his reasons for a new trial, and counsel for appellee moved for judgment upon the verdict. It is well settled that a bill of exceptions is the pleading of the party presenting it, and must be taken most strongly against him. We are of opinion, after a full and careful reading of the bill of exceptions in this regard, the substance of which has been set out, that the court at the same time, and immediately following the rendition of the verdict, had before it the motion for a new trial, and reasons therefor, and that appellants' counsel, at the same time, stated to the court the language hereinabove quoted, which we think is a clear waiver of all errors of the court complained of. They are now asking a court of review to do precisely what they would not ask the trial court to do for fear it would grant their request, viz., give them a new trial. They should not and will not be permitted in this court to ask relief which they, when called upon by the trial court to state their reasons on which they claimed such relief, declined so to do. Counsel should have given the trial court the benefit of argument upon the motion for a new trial, or at least have stated his reasons therefor when

called upon by the court. It can not aid appellants that the common law record shows the motion for new trial was overruled "after arguments of counsel." The bill of exceptions must control.

Counsel have cited no case deciding the precise point here presented, nor have we, in the time at our disposal, found such a case; but the following cases are to the effect that it is the duty of a litigant, who on appeal complains of the action of the trial court, to call to the attention of that court in some way the reasons of his complaint; otherwise they are waived. *Jones v. Jones*, 71 Ill. 562; *Brewer v. Nat. N. B. Ass'n*, 64 Ill. App. 161-4; *Ry. Co. v. Van Pelt*, 68 Ill. App. 583-5.

Notwithstanding the errors of procedure indicated, we think they are waived, and the judgment is therefore affirmed.

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